C
5

This Book is cited as 8 Modern
by Burn Justice Tit appr. 58
where he cites the Case of Chitty
& Lofthus. 190 — Tit Setting by Assistants 37 —

In Comyns Rep. 563. this is cited as 2d Mod.

The late Sr Michael Foster observes that a Case in Moos Reports 264
is wretchedly reported — Foster's Crown Law 374 in the notes And the
late Sr James Burrow makes a similar Objection to the Same
Book 1 Bur Rep 386 — 3 Bur Rep. 1326 — 4 Bur Rep. 2530 —
11 State Trials 304 Col. 2. margin — In 1769 the Compiler of the
Cases as Largo concerning Tithes In° Rayner being
favord with a Copy of the S.d Reports wherein the Principal
Deficiencies are Supplied & the most considerable
Errors rectified by Sr James himself, in his own hand
writing the Compiler therefore of the Cases edited the Book that year
after having carefully compared with the Manuscript
4 Bur Rep. 2530

ab.t 1 Dec.r 1749 } Xmas Sess.s 1749

Mary Root was apprehend in a prebrid
posture of hanging herself & by an false
Story imposed upon many tender People
to give her money & after being Examined
was ord.d & Committed as a Vagrant to
the house of Correction — where a
Motion was made to have her Discharged
& it was the Opinion of Mr Bond —
Chairman who (first elected by direction of
Chairman who) cited a Case in his
Nisi Book — Hil 7 Jac. 12 Acon
Relating to Vagrants the latter does not say
for how long to be Committed but understood
to the Sessions — Mary Talbot's Case in B.R.
it was determ.d in L.d Hardwicke's time —
Co.d not be Convicted — as her Offence —
Deserv.d — Q whether indictm.t for Vagrancy
Tho.' not to be laid might be Convicted upon that if true
indictable & proved & if Convicted may be whipt
& 1 Sid. 281. Style 27 —

England, Court of K. King's Bench. Reports
6120 m 4.

MODERN CASES
IN
Law and Equity.

In TWO PARTS.

CONTAINING

I. Reports of Special CASES
ARGUED and ADJUDGED
IN THE
Court of King's Bench,
In the VII, VIII, IX, X, XI and XII Years of
King *GEORGE* I.

II. CASES
ARGUED and DECREED
IN THE
High Court of Chancery,
In the VIII, IX, X and XI Years of
King *GEORGE* I.

To which are added,
Some Special CASES on APPEALS.

In the *SAVOY*:
Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *E. Sayer*, Esq;)
for Thomas Osborne, in *Grays-Inn*. MDCCXXX.

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Some Special CASES ON APPEALS.

BRITISH MUSEUM 10 NOV 54

THE

PREFACE.

LAW and Equity (the Subjects of the enſuing Caſes) muſt be allowed to be the ſupream Excellencies in all Civil Governments; and as no Nation can poſſibly exiſt without thoſe Rules and Sanctions, ſo their Eſtabliſhment and Advancement will be acknowledged to be both the chiefeſt Honour and Glory of Princes, as well as the higheſt Security and Happineſs of the People.

The Publication of theſe Caſes was deſign'd for the Publick Benefit, and have been communicated to Perſons of known Learning in the Laws, who think them not inferior to many of the Late Books of this Nature; nor is it to be doubted but that upon a ſerious Peruſal, they will likewiſe appear to the intelligent Reader to be taken with great Care and Judgment.

The firſt Part contains Caſes argued and adjudged in the Court of King's Bench, *from the Beginning of* Michaelmas Term, 1721. *to the End of* Trinity Term, 1726. *wherein are illuſtrated and explained, not only many of the moſt Modern (which are always the beſt eſtabliſhed) Rules of Practice and Method of Proceeding in that Court, but many uſeful and curious Points, relating to the Rights and Prerogative*

of the Crown, as well as the private and particular Rights of the Subject; in the Arguing and Debating whereof, not only diverſe former abſtruſe Opinions are cleared up and ſettled, but likewiſe many antient and modern Statutes are illuſtrated and explained.

The latter Part of this Collection conſiſts of ſome ſelected Caſes argued and decreed in the High Court of Chancery, inter Paſch. 8, *and* Trin. 11 Geo. I. *incluſive, wherein not only divers of the Points and Statutes before-mentioned are expounded and determined by an equitable Conſtruction; but alſo ſeveral Inſtances of Relief given in Caſes not relievable at Law, and the three following Caſes on Appeals.*

1. The Caſe of *Trevor* and *Trevor*, relating to the Marriage Articles, and divers other Settlements, made by Sir *J. T.* late Maſter of the *Rolls*, decreed and appealed in 1719.

2. The Caſe of *Roper* and *Radcliff*, on the Stat 11 & 12 *W.* 3. for diſabling Papiſts to purchaſe Lands, decreed and appeal'd about 1713. with two learned and elaborate Arguments on the Hearing that Cauſe.

3. The Caſe of the Lord *Derwentwater*, upon an Appeal from the Commiſſioners of forfeited Eſtates, heard before the Judges thereto delegated, 16 *Feb.* 1718. 5 *Georgii.*

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DE
Term. Sanct. Mich.
Anno 7 Georgii, 1721.

Stratford *verſus* Neale.

UPON a Writ of Erroꝛ on a Judgment given in the Court of King's Bench in Ireland; the Caſe was thus: Variance between the Libel and the Plea.

ſt. One Neale libelled in the Spiritual Court there, foꝛ Two third Parts of the Tithes due to him for dry Cattle fed in ſuch a Pariſh, &c.

The Defendant ſuggeſted foꝛ a Pꝛohibition, that the Cattle foꝛ which thoſe Tithes were demanded were Beaſts of the Plough, and other dꝛy Cattle fed in the ſaid Pariſh with Hay and Stubbles of Coꝛn, foꝛ which Tithes had already been paid; whereupon a Pꝛohibition was granted; and that the Right might come in Queſtion, the ſaid Stratford was oꝛdered to declare upon the Pꝛohibition, which he did, and in the ſame Manner as befoꝛe he had ſuggeſted and concluded his Declaration, that the Defendant had pꝛoceeded in the Spiritual Court after a Pꝛohibition deliveꝛed, &c. Et contra prohibitionem, &c.

The Defendant pleaded, that the Cattle foꝛ which he had demanded the ſaid Tithes were not ſuch as the Plaintiff had ſet foꝛth in his Declaration, noꝛ fed with ſuch Hay and Stubbles; and then pleaded, that he had a Right to two integral Parts of the Tithes of all dry Cattle fed in that Pariſh, and that he had not pꝛoceeded contra formam prohibitionis, &c.

Upon this they were at Iſſue, and the Defendant had a Veꝛdict and Judgment foꝛ a Conſultation, which was awaꝛd-

ed; on which Judgment the now Plaintiff brought a Writ of Error; and it was insisted for him, that there was a Variance in the Pleadings, and that the Verdict would not support this Judgment.

First, As to the Variance in the Pleadings, (viz.) The Plaintiff in the Spiritual Court, had by his Libel, demanded Two third Parts of the Tithes due to him for dry Cattle, &c. And being Defendant in the Action, he claimed a Right to two integral Parts of the Tithes, &c. so that his Plea varies from his Libel, and therefore a Consultation should not be awarded, because that gives him a Power to sue for any Thing not in the Libel.

To which it was answered, that the Awarding a Consultation is no more than Giving the Defendant Liberty to proceed on his former Libel in the Spiritual Court, and consequently if there is any Variance between the Libel and the Plea, 'tis no Cause to reverse the Judgment, because the Consultation gives him no new Power to sue for any Thing, but only to proceed on that very Libel which he had already exhibited.

Plow. Com. 468, 471. 1 Leon. 241. 2 Rep. 43. 1 Saund. 81, 82. 140, 143. Shower 201. Lutw. 1043.

Then, as to the Verdict, it was objected, that the Jury found that the Cattle for which the said Tithes were demanded, were not fed with Hay and Stubbles for which Tithes had been already paid, but they did not find that there were any Proceedings in the Spiritual Court after a Prohibition delivered; and therefore it was insisted for the Plaintiff in this Action, that if all the Issues are not found, this Judgment cannot be supported; and 'tis Part of this Issue, that the Defendant had proceeded in the Spiritual Court after a Prohibition delivered; and if this had been found, then the Plaintiff would have been entitled to Damages.

Plow. Com. 471. 3 Lev. 39. 1 Vent. 34, 38. 2 Jones 188.

'Tis true, if an Issue is joined on Part of a Thing in Suit, and that Part is found by the Jury, such a Finding will support the Judgment; but when several Issues are joined, as in this Case they are, and some are found, and some not found, the Verdict is insufficient.

'Tis certain the Plaintiff would have been entitled to Damages, if this Matter had been found, for there is an Authority in Point * in Ventris's Reports, where it was found, and the Plaintiff had Judgment for his Damages; 'tis true, that Judgment was reversed, but it was because the Plaintiff had not laid a Venue where the Proceedings were, &c. after the Prohibition delivered.

* 1 Vent. 34, 38.

To which it was answered, that this Objection is only to Matter of Form, which is cured by the Verdict, for so is

the not finding any Proceedings by the Defendant after a Prohibition delivered, and contra prohibitionem, all which is meerly formal, and like the not Finding the Breaking and Entry vi & armis in an Action of Trespass. 1 Leon. 115. Moor 182. 13 Rep. 58.

The Court was of Opinion, that the Awarding a Consultation is no more than setting aside the Prohibition, and giving the Plaintiff in the Spiritual Court Liberty to proceed on his Libel; and that the Variance between his Libel and his Plea is not material; for tho' in the one two third Parts are demanded, and in the other two intregal Parts, yet that must be understood secundum subjectam materiam. Curia.

As to the other Objection against the Verdict, 'tis true, where several Issues are joined, a Verdict which finds one, and not the other, is not good; but in this Case the not finding any Proceedings in the Spiritual Court contra formam prohibitionis is but Matter of Form; however, this Verdict hath found all the material Parts in Issue; and therefore 'tis sufficient to support this Judgment. Where several Issues are joined, and the Jury find one.

Now the Alledging in the Declaration, that the Plaintiff in the Spiritual Court had proceeded there contra formam prohibitionis, is but a supposed Contempt, and suggested by the Plaintiff in the Action as a Ground for a Prohibition, and the not finding this Contempt is altogether immaterial, and the same with not finding vi & armis in an Action of Trespass; 'tis true there are Precedents both Ways; but in such Cases the Judges always follow that which is least prejudicial.

As to that Case in Ventris's Reports, there was actually a Proceeding after a Prohibition granted; and this was found by the Jury, and Damages assessed; but the Venue being laid in a wrong County, the Jury could not subject the Defendant to pay the Damages; and therefore that Judgment was set aside; so 'tis out of this Case.

Besides, if the Plaintiff would have any Advantage by the Defendant's Proceeding after a Prohibition, this being Matter of Evidence, he (the Plaintiff) should have proved it in the Trial, and insisted on his Damages which he had not done; therefore the Judgment was affirmed by the whole Court.

The King *versus* Glegg.

Order of Bastardy quashed, for not setting forth that the Party was duly summoned.

THE Defendant Glegg was, by the Order of two Justices of the Peace, adjudged to be the putative Father

ther of three Baſtard-Children; and it was ordered, that he ſhould pay 10 l. to the Overſeers of the Poor of the Pariſh of, &c. for Charges which the ſaid Pariſh had already ſuſtained by Reaſon of thoſe Baſtard-Children, and 2 s. and 6 d. every Week for ſo long Time as the ſaid Children, or any, or either of them ſhould be chargeable to the ſaid Pariſh; which Order was confirmed upon an Appeal to the Seſſions; and both the ſaid Orders being removed into B. R. by Certiorari, it was inſiſted in Glegg's Behalf, that the Order made by the two Juſtices was irregular.

Firſt, Becauſe it did not ſet forth, that Glegg was duly ſummoned to appear before them; 'tis true, it ſet forth, that he had Notice to appear, but did not ſhew for what Cauſe; and therefore 'tis no regular Summons.

(2.) The two Juſtices have not Power to Charge him with a Sum in groſs.

Curia. The Court was of Opinion, that if Glegg was not ſummoned to appear, and for what Cauſe, they might quaſh this Order, for 'tis againſt the Law of England, that a Man ſhould be impeached without Notice to make his Defence; and all inferior Juriſdictions ought to ſhew, that they have proceeded according to that Power which they have by Law; otherwiſe they muſt be compelled ſo to do.

'Tis admitted, that the Juſtices of Peace have an original Juriſdiction in Caſes of Baſtardy, and that their Orders if regular ſhall be concluſive, but if irregular (as this is) they ſhall be quaſhed.

Putative Father may be charged with a Sum in groſs. 18 El. c. 3. As to the other Objection, a putative Father may not be charged with a Sum in groſs, tho' this is ſeemingly againſt the Statute 18 Eliz. by which the Power given to the two Juſtices, is to charge the Mother, or reputed Father, with the Payment of Money Weekly; but they have likewiſe Power to take Order for the Relief of the Pariſh, which muſt be intended againſt the Charge which it may ſuſtain, as well as againſt the Charge already ſuſtained.

There was another Objection againſt this Order, (viz.) That Glegg was charged to be the Father of three Baſtard-Children by one Order, when there ſhould be as many Orders to charge him as there were Baſtards.

But as to this Matter, the Court gave no Judgment, but that the Pariſh ſhould have Time to ſhew whether Glegg was regularly ſummoned to appear before the two Juſtices who made this Order.

The King *verſus* Walter.

THE Defendant was committed by a Warrant under the Hand and Seal of a Juſtice of the Peace for being a notorious Owler and Smugler; and was afterwards indicted for this Fact, and being in Cuſtody brought an Habeas Corpus, and moved by his Counſel to be diſcharged. The Defendant being in Cuſtody, muſt be tried within two Terms after the Indictment found.

(1.) Becauſe he had been in Gaol two Terms ſince the Indictment was found; and not yet brought to his Trial.

(2.) The Charge in the Warrant of Commitment is very looſe, (viz.) for that the Defendant was a notorious Owler and Smugler, which is not a ſufficient Charge to deprive a Subject of his Liberty, eſpecially in a criminal Cauſe where the utmoſt Certainty is required.

The Court allowed the firſt Objection, (viz.) That the Defendant ought to be tried within two Terms after his Commitment; otherwiſe he muſt be diſcharged according to the Habeas Corpus Act. Curia.

But as to the other Objection they held, that a Juſtice of Peace muſt take Care that he hath ſuch an Information of the Fact as may be ſufficient to ſupport his Warrant of Commitment, but he need not ſet it forth in the Warrant it ſelf; becauſe ſo much Certainty is not required in Warrants, as in Writs and Pleadings which are always on Record.

The King *verſus Archbiſhop of* Armagh.

UPON a Writ of Error on a Judgment in the King's Bench in Ireland, the Caſe was thus: Churches cannot be united after the Avoidance of one.

1ſt. The King was ſeiſed of the Advowſon of the Vicarage of Louthe in the Dioceſe of Armagh; and the Archbiſhop was ſeiſed of the Advowſon of the Rectory of, &c. near the ſaid Vicarage, and being ſo ſeiſed, the King's Incumbent died; and after the ſaid Vacancy, the Archbiſhop by an Inſtrument under his Archiepiſcopal Seal united both the ſaid Livings according to the Power which he had by the Statute * 17 Car. 2. by which 'tis enacted, That in every City or Town Corporate, and their Liberties, where there are two or more Churches or Chapels, and Pariſhes thereunto belonging, the Biſhop of the Dioceſe, with the Con- * 17 Car. 2. cap. 3.

Conſent of the chief Officer or Officers there, or the major Part of them, and of the Patrons of ſuch Churches may unite them, *&c.* and the Pariſhioners ſhall pay all Tithes and other Duties to the Incumbent of the Church to which the other is united; but that notwithſtanding ſuch Union, the Pariſhes ſhall continue diſtinct as to all Rates, Taxes, and parochial Rights; and Churchwardens ſhall be appointed for each Pariſh as before the Union.

And where one or both of the ſaid Churches are full at the Time of the Union, it ſhall take Effect at the next Avoidance after; and the Patrons ſhall preſent by Turns to that which remains, *&c.* and that he whoſe Incumbent dies firſt, ſhall firſt preſent, and afterwards by Turns ſucceſſively for ever.

Now the King's Incumbent being dead, (and the Vicarage being afterwards united to the Rectory as aforeſaid) the King preſented another Vicar, and the Archbiſhop refuſing to admit him, a Quare Impedit was brought againſt him (the Archbiſhop) and Judgment againſt him in the King's Bench in Ireland; upon which he brought a Writ of Error in this Court.

And his Counſel argued for him, that by the general Words of this Statute, this was a good Conſolidation, tho' after the Avoidance of the Vicarage by the Death of the King's Incumbent; and that the King's ordinary Right ſhall be bound by ſuch general Words in an Act of Parliament, which in this Caſe was his Right of Preſentation, tho' a Right, which he hath by any Prerogative, ſhall not be bound by ſuch Words.

Cro. El. 500.
2 Roll. Abr. 778.
Dyer 250.

2 Inſt. 360, 681.
5 Rep. 14.
11 Rep. 66.

Every Statute which is made for the Advancement of Juſtice, for the Eſtabliſhment of Religion, or to ſuppreſs Wrongs, or to perform the Will of the Donor, to maintain the Poor, or for the Encouragement of Learning, ſhall bind the ordinary Right of the King by general Words as well as the Right of the Subject; and this Statute hath two of theſe Purpoſes, (viz.) Eſtabliſhment of Religion, and Encourgement of Learning.

And this is proved by every Saving of the King's Right in an Act of Parliament, for that ſhews his Right would be bound, if it was not ſaved.

Econtra.

On the other Side it was argued to ſupport this Judgment, that by the Statute before-mentioned, a new Power was created, and conſequently it muſt literally be performed; which in this Caſe was not done; nay, 'tis impoſſible to be done, becauſe 'tis enacted, that after the Union, the Patron whoſe

Incumbent first dies, shall have the first Presentation, which shews, that the Legislature intended that both the Churches should be full at the Time of the Union; for otherwise the Right of Survivorship could never take Place; now here one was void, when it was united to the other, and after it was consolidated to the other, there was but one Incumbent; and if but one Incumbent, then 'tis impossible that those Words in the Statute can ever be satisfied, (viz) That he whose Incumbent first dies, shall first present, for these Words import, that both the Incumbents must be living at the Time of the Union. 1 Lev. 95. 2 Jones 130.

Now here the King's Incumbent was dead before the Union, and consequently a Right was vested in the Crown to present another; and it would be very hard, and what was never intended by this Statute to devest the King of that Right by such an Union as was made by the Archbishop in this Case.

Besides, it may be reasonably intended, that the King is not comprehended in this Statute, because the Union is to be at the equal Expence of both Patrons, and by their Consent; and it would be indecent that the King should join with a Subject in the Expence of a Commission.

'Tis true, this Union creates a new Parsonage, and the Church being full of the Archbishop's Incumbent, he may claim a Right to both; but that can be no Objection, because in a Quare Impedit Plenarty is no Plea against the King's Right. 11 Rep. 72. 3 Lev. 382.

Upon the whole Matter it was admitted, that the Words in this Statute are general, and that the Right of the Crown may seemingly be bound by them; but tho' the Words are general, yet they ought to be specially construed to avoid an apparent Injury; for the Intent of the Act was to put Things in an ordinary and regular Method, and not to devest either of the Patrons of their respective Right, and such a Construction would be conformable to the Intent of the Legislature, (viz.) That all Unions should be made by the Consent of both Patrons, and not to the Damage of either; and that the Churches should be united when there are two Incumbents living, because the Statute gives the Right of Presentation to that Patron, whose Incumbent should first die, which might happen to be the King's Incumbent; but now by this Union, he is deprived of that surviving and contingent Right of Presentation, which is an apparent Damage done to the Crown.

The Court was of Opinion, that this Statute never intended any Union should be made of two Churches after an Avoidance in one; for by the Common Law (by which this Act must be construed) there could be no Union but by the Consent Curia.

Consent of both Patrons; neither could it be made in præsenti, but by the Consent of both the Incumbents, tho' the Patrons did agree to unite, tho' it might be made in futuro without the Consent of the Incumbents.

Therefore it would be very hard to construe this Statute so as to make an Union good, where both the Churches are not full at the Time the Union was made; for 'tis not so by the Canon Law in Cases of Presentation and Consolidation, and 'tis that Law which should direct in this Case.

Hob. 143. Where the King cannot be devested of his Prerogative by general Words in a Statute.

'Tis clear that the King cannot be devested of any of his Prerogatives by general Words in an Act of Parliament, but that there must be plain and express Words for that Purpose, tho' all his other Rights are no more favoured in Law, than the Rights of his Subjects; and 'tis likewise clear that general Words in an Act of Parliament may be qualified by subsequent Sentences or Clauses in the same Statute; but certainly it was never the Intent of the Legislature by this Act to work a Wrong to any Patron; but if this Union should be good, it would devest the King of that Right which was already vested in him to present to this Vicarage; and such a Construction of the Statute would be a Damage not only to the Crown, but it may happen so to be to several other Patrons.

Besides, in this Case there being two Benefices united after an Avoidance in one, 'tis plain that the Archbishop made the Union for his own Benefit, which is against a Principle in Law.

Plenarty no good Plea in Bar to the King's Right.

As to the Plenarty which the Defendant pleaded to this Quare Impedit, the whole Court agreed, that it was not a good Plea in Bar to the King's Right; and that was the principal Reason why the Court of King's Bench in Ireland gave Judgment for the King.

But as to some other Points, there were various Opinions, (viz.) For two Judges held, that the Union was not good, because it was made after an Avoidance of one of the Churches united; another held that it was good, but that it was not to take Effect till after the King had presented to that Church; and one of them held, that by the Union the Church united was extinct, and that he did not know in what Manner the King could present to a Church which was extinct.

Another held, that the Church was not extinct by the Union, because it was a Spiritual Act, which did not extinguish the Church as to the Right of either Patron, for if one Church had been appendant, and the other in gross before the Consolidation, they would be so after it.

But for the Reasons before-mentioned, the whole Court agreed, that the Judgment in Ireland should be affirmed.

Monk *versus* Graham.

AT the Nisi prius in the Common Pleas; the Case was thus:

§ One Hackett bought Stock to the Value of 750 l. in the third Subscription in the South-Sea Company, and received 50 l. per Annum for it, and afterwards sold it, which by several mesne Conveyances came to the now Plaintiff, Mrs. Monk, who purchased it for 1000 l. and she living in the Country, entrusted one Rosse (who was an Officer of the Exchequer) with the Minutes, and an Order to receive this 50 l. per Ann. for her Use, the said Rosse being then a Man of Credit, and discounting for at least 30000 l. per Annum of the Revenue.

Afterwards Rosse pretending he had a Power to sell the said Stock, made an Agreement in Writing with the Defendant Graham, to sell it to him for 994 l. and told him the Plaintiff would sign the Transfer, but he got another Woman to personate the Plaintiff, and to sign the Transfer; and at the next Opening the Books of the Company he got the same transferred to the Defendant, and made Affidavit of the Sale, and got it entered in the said Books, this being required by Act of Parliament to every Transfer, and then he withdrew himself out of the Kingdom, so that he could not be found.

The Plaintiff hearing that Rosse was withdrawn, came to London, and demanded the Stock of the Defendant, who told her, that he had bought it of Rosse, and had got the Minutes, the Transfer, and the Affidavit, which were all the Conveyance the Law could give, and believed, that if she had any Title, she had nothing to shew to make it appear; and therefore she came too late to make any Demand on him.

Afterwards the Defendant (tho' forbid by the Plaintiff) sold this Stock for 1090 l. to T. S. who sold it again to R. W. for 1109 l. and then the Plaintiff brought an Action of Trover against the Defendant; and notwithstanding her Folly in trusting Rosse with the Minutes, (which the Counsel for the Defendant did much rely on) the Chief Justice, Sir Peter King, directed the Jury to find for the Plaintiff, which they did, and gave her no more than 750 l. Damages.

The Church-wardens of Biſhopſgate *verſus Alderman* Beecher.

Mandamus to a Juſtice to grant a Warrant to diſtrain for a poor Tax.

THE Church-wardens of the ſaid Pariſh, &c. made a Tax for the Relief of their Poor for a whole Year, which amounted to 600 l. and upwards, when they ſhould have made only a quarterly Tax; and the ſame, thro' Inadvertency, was confirmed by Alderman Beecher, who was Alderman of that Ward; and afterwards he fearing that the Church-wardens might collect the whole Sum, and make ſome ill Uſe of it, refuſed to grant a Warrant to diſtrain for this Tax; whereupon the Church-wardens moved B. R. for a Mandamus to compel him to grant his Warrant, and obtained a Rule of Court for him, to ſhew Cauſe why a Mandamus ſhould not be granted.

And at another Day the Alderman by his Counſel ſhewed all the Matter before-mentioned for Cauſe, &c. and a Rule was made, that he ſhould grant his Warrant to diſtrain for the Tax for one Quarter of a Year, and no more, for he could not confirm this Tax in Part; it muſt be for the Whole, or for no Part.

A Fact was laid in the Town of *Cambridge*, but did not ſay in what County; good, the Indictment being for a Conſpiracy. 2 Inſt. 669.

The King *verſus Journeymen-Taylors of* Cambridge.

ONE Wiſe and ſeveral other Journeymen-Taylors, of or in the Town of Cambridge, were indicted for a Conſpiracy amongſt themſelves to raiſe their Wages; and being found guilty, they now by their Counſel moved in Arreſt of Judgment upon ſeveral Errors in the Record.

(1.) Firſt, It was objected, that this Fact being laid in the Town of Cambridge, it did not appear by the Record in what County Cambridge was, which it ought to do, becauſe there are other Towns of that Name in England.

It was inſiſted, that the Omiſſion of the County was a fatal Error in the Record, and not to be helped by naming the County in the Certiorari to remove this Indictment, becauſe that Writ is only an Order of this Court.

Neither ſhall it be intended, that Cambridge is in the County of Cambridge, becauſe this is a criminal Caſe, and Intendments are never allowed in Proſecutions of that Nature.

7 Georgii cap. 13.

(2.) This Indictment ought to conclude contra formam ſtatuti, for by a late Statute Anno 7 Georgii, Journeymen-Taylors

lors are prohibited to enter into any Contract or Agreement, for advancing their Wages, &c.

These Objections were thus answered. Econtra.

First, That the Fact being laid in the Town of *Cambridge*, it shall be intended, that the Town is within the County of Cambridge, for which the Authorities in the Margin are in Point. 5 Reg. 120. Long's *Case*. Salk. 118.

Besides, the Justices of Peace having Jurisdiction within the Town of Cambridge, it need not be alledged in what County that Town lies, because in order to support all inferior Jurisdictions, this Court will intend their Proceedings to be regular and good, if the contrary doth not appear. March 124. Cro. Car. 108. Sid. 342.

(2.) As to the Omission in not concluding this Indictment contra formam statuti, 'tis not material, that it should be so concluded, because it was for a Conspiracy, which is an Offence at Common Law; 'tis true, this Indictment sets forth, that the Defendants refused to work under such Rates, which were more than enjoined by the Statute; for that is only 2 s. per diem, but yet these Words will not bring the Offence for which the Defendants were indicted to be within that Statute, because 'tis not the Denial to work for more Wages than allowed by the Statute, but 'tis for a Conspiracy to raise their Wages, for which these Defendants are indicted; 'tis true, it doth not appear by the Record, that the Wages demanded were excessive, but that is not material, because it may be given in Evidence. Hob. 88.

A Venire facias directed to the Sheriff of Cambridge to return a Jury; if he return one de vicineto Cantabrigiæ, this is good; for Cambridge being mentioned in several Acts of Parliament, this Court must take Notice of such Acts, and upon such a Return will intend, that Cambridge is in the County of Cambridge. Curia.

And as to the second Objection, the Court was of Opinion, that this Indictment need not conclude contra formam statuti, because it was for a Conspiracy, which is an Offence at Common Law; 'tis true, this Indictment set forth, that the Defendants denied to work under such Wages as they demanded; but tho' this might be more than directed by the Statute; yet 'tis not for the Denial, &c. but for the Conspiracy they were indicted; and a Conspiracy of any Kind is illegal, tho' the Matter about which they conspired might have been lawful for them, or any of them to do, if they had not Indictment good without concluding *contra formam statuti*.

conſpired to do it; and this appeared in the Caſe of the Tub-Women againſt the Brewers of London.

So the Judgment was confirmed by the whole Court.

The Caſe of Sir Hans Sloane, *Precedent of the College of Phyſicians.*

Whether the Phyſicians are excuſed from finding a Horſe to ſerve in the Militia.

IN Treſpaſs for entering his Houſe, and taking a Silver-Tankard; the Defendant juſtified under a Warrant from the Lieutenancy of Middleſex to levy 8 l. by Diſtreſs, &c. for not appearing, *&c.* being duly ſummoned, and for not finding a Horſe to ſerve in the Militia; and this Cauſe being at Iſſue, and coming on to a Trial before the Lord Chief Juſtice Parker, (now Lord Chancellor) he ordered it to be made a Caſe, and to be referred to the Opinion of the Court of King's Bench, which was accordingly done, and coming now before the Court, the Caſe was thus ſtated:

14 Car. 2. cap. 3.

1ſt. That the Lord Pawlett was Lord Lieutenant of the County of Middleſex, and as ſuch had Power by the Statute 14 Car. to call together Perſons from Time to Time, and to arm and array them, as by the ſaid Statute is directed, and to charge him who hath an Eſtate of 500 l. per ann. in Poſſeſſion, or 6000 l. in Goods and Money, with Horſe, Horſeman and Arms, and ſo proportionably.

And by the ſame Statute Power is given to the Lord Lieutenants and their Deputies, to inflict a Penalty not exceeding 20 l. upon thoſe who are charged, &c. and who neglect to find a Horſe, &c. and to ſerve in Perſon, or to provide another to ſerve in his Place, which Penalty is to be levied by Warrant, by the Diſtreſs and Sale of Goods, &c.

That the Lord Pawlett cauſed the Plaintiff Sir Hans Sloane, Precedent of the College of Phyſicians, to be ſummoned to appear in Perſon, or to find a Horſe and Arms for another to ſerve in the Militia, &c. in his Place, which he refuſed, inſiſting on a Charter of Exemption granted to the College of Phyſicians by King Charles the Second, in the 15th Year of his Reign, from bearing or providing Arms to ſerve in the Militia; by which Charter another is recited, which was granted to the ſaid College by King H. 8. and another by King James the Firſt, exempting them from ſeveral Services.

Thereupon the Plaintiff Sir Hans Sloane was fined 8 l. and a Warrant was granted by the Lord Pawlett to levy the ſame by Diſtreſs and Sale of his (the Plaintiff's)

Goods, and accordingly the Officer to whom the Warrant was directed, entered the House, and distrained a Silver-Tankard for which the Plaintiff brought this Action of Trespass, and the Defendant justified, &c.

Now upon arguing this Case, three Points were made.

(1.) The first was concerning the King's Power to grant Charters of Exemption from the Penalties or Charges imposed on the Subject by Act of Parliament.

(2.) Admitting the King had such a Power, then whether there were sufficient Words in this Charter to make such an Exemption.

(3.) Whether the Justification under this Warrant was good.

Whether the King hath a Power to grant Charters of Exemption from Penalties imposed by Act of Parliament.

See Dyer 52, 211. Plow. Com. 226, 501. 6 Rep. 7. 7 Rep. 63. Cro. Car. 428. Vaugh. 381. 3 Lev. 392.

As to the first Point, it was argued for the Plaintiff, that the King hath Power by his Charter to exempt any Subject from the Penalties of this Statute, and that the Words in this Charter are sufficient for that Purpose.

Now that he hath Power to exempt the Subject from the Penalties in this Statute seems very plain, because before this Statute was made, the Power of the Militia was in the King, and it was originally so at Common Law; and this Statute was made to ease the Crown of a Labour, and to put Things in an ordinary Form, but not to deprive the King of that Power which he had before.

And as a parallel Case, the King may exempt any Subject from the Payment of Taxes imposed by Act of Parliament; as for Instance, he might exempt him from Payment of Tenths and Fifteenths; and tho' it may be objected that a Charter of Exemption of all Men in general from the Penalties of the Militia Act, would be totally to elude the Act it self; yet it will not follow from thence, that a particular Charter of Exemption of a corporate Number of Men will not be good; for the first is but meerly possible, and a Thing which no King in his right Senses would do; but the second is frequently done; 'tis true, this Exemption may be said to do an Injury to others, by laying a heavier Charge on their Lands, but 'tis more properly a Charge on the Person in respect of his Lands; and therefore 'tis a good Exemption.

Now admitting that the Power of the Militia was entirely in the Crown before the Making this Statute, (as certainly it was) and so declared by the Statute 13 Car. 2. 'tis as certain, that the King might exempt any of his Subjects from

from ſerving in it, and if ſo, then the Statute hath made no Alteration of his Power.

The old Commiſſions of Array, on which this of the Lieutenancy is founded, were to array all thoſe who are able to ſerve, and that thoſe who were not able to ſerve in Perſon ſhould contribute to thoſe who were; yet the King might exempt any of his Subjects (unleſs in Caſes of apparent Danger) from this Service.

Tenants by Knight-Service were the firſt Militia of this Kingdom, it being a Tenure inſtituted for the Defence thereof; for thoſe Tenants (as my Lord Coke tells us) were always to be armed for that Service, yet the King could exempt any of them from attending, unleſs it was where the Danger was apparent, as to ſuppreſs a Rebellion, or to repel an Invaſion; in which Caſes none could be exempted.

1 Inſt. 68, 71. 4 Inſt. 192.

So the King might exempt particular Perſons from being Jury-men, unleſs in a Writ of Right; 'tis true, he cannot exempt a Knight from being of the Jury, where a Peer is concerned in the Trial as a Party; and the Reaſon is, becauſe by ſuch an Exemption there would be a Failure of Juſtice; and the Subject hath a greater Intereſt in Juries than he hath in the Militia.

Now as to this Statute it ſelf, it ſhews, that the Parliament did not intend by any Implication to deveſt the King of any Right or Prerogative which he had before it was made; for the Clauſe which concerns this Matter is, that the King may from Time to Time iſſue out Commiſſions of Lieutenancy, and that the Lieutenants may array Perſons, and form them into Companies, and conduct and employ them within ſuch Places for which they ſhall be commiſſioned, &c. as the King ſhall direct; which laſt Words ſhew, that the Militia is ſtill to be under his Direction; and the Beginning of this Clauſe is, that he may iſſue out Commiſſions for the ſeveral Counties, Cities, and Places of England and Wales, &c. but there is no Time limited when; ſo that he is not obliged to iſſue them out every Year, nor for all the Counties, for he may do it for one County, and no more; and if in one County, he may exempt ſome Perſons there from this Service, for there are no expreſs Words in this Statute to deveſt the King of ſuch Power; and 'tis certain, that in the moſt minute Caſes of the King's Prerogative it cannot be taken away by any * general Words in an Act of Parliament.

* 11 Rep. 74. Hob. 146. Moor 542. 3 Lev. 382.

Now the Power which the Lieutenants have by this Statute, is only a bare Authority to arm, array, and form Perſons into Companies, &c. and as this Power is given to them

them by Commiſſion from the King, ſo he may ſuſpend that Power ad libitum; and 'tis certainly ſuſpended by this Charter granted to the College of Phyſicians, becauſe it exempts them from all Powers in the ſaid Act, which muſt be from the actual Service in the Militia in Perſon, and from providing another to ſerve in their Place, the one being the primary, and the other the ſecondary Service.

Beſides, this Statute was made to relieve, and not to charge the Subjects; and 'tis abſolutely neceſſary that a Power of exempting Perſons ſhould be lodged ſomewhere, 'tis daily done by the Lieutenants themſelves, and 'tis done by Virtue of their Commiſſion; and if they may exempt, and not the King, this Abſurdity would follow, (viz.) That the derivative Power is greater than the Power from whence 'tis derived.

But there are many Inſtances of the King's Power of Exemption, (viz.) The Province of Canterbury granted the Tenths, &c. to the King, and appointed a certain Perſon to collect them; and the Convocation ordered, that no privileged Perſon ſhould be exempted from being a Collector; yet one who had a Charter of Exemption from the King, was adjudged by Virtue thereof to be exempted. Bro. Exempt, pl. 9, 14. Bro. Patent, pl. 16. Dyer 52. Sid. 7.

The * Subſidy Bills take Notice, that no Letters Patent of Exemption ſhall be taken to excuſe or exempt any Perſon from the Taxes, or from the Charge of any Sum appointed to be paid by thoſe Acts; and that all Non obſtante's in Bar of any Act of Parliament for the Supply or the Aſſiſtance of the King, are declared to be void. * Anno 22 Car. 2. 6 & 7 W. 3. 7 & 8 W. 3. cap. 18.

Now ſince the Legiſlature thought it proper to mention ſuch Powers of Exemption, and to prohibit the Effects thereof, this ſeems to prove, that ſuch Powers remain in the King, if they had not been prohibited to be put in Execution; tho' it doth not ſeem abſolutely neceſſary to mention thoſe Powers in theſe Acts, becauſe the Subſidies were given to the Crown for particular Uſes mentioned in the Acts themſelves; ſo that if ſuch Patents of Exemption had not been named in thoſe Statutes, the King could not have diſcharged any Man from the Payment of thoſe Subſidies, becauſe they muſt be applied to thoſe Uſes for which they were given. 3 Mod. 96, 97.

As to this Charter granted to the College of Phyſicians, it hath been allowed and acquieſced under, ever ſince it was firſt granted to this very Time, which is a ſtrong Preſumption that 'tis good; and the Statute 1 Georgii, which takes Notice, that ſuch People who are exempted from ſerving in the Militia, ſhall not be included in that Act, is a ſtrong Proof that ſome are exempt. 1 Geo. cap. 3.

Neither

Neither is any particular Perſon damnified by this Exemption, but all People alike, for it impoſes no new Charge on them, but leſſens the old Charge as to ſome particular Perſons exempted; neither is it any Manner of Charge on the Lands, for the Statute requires a perſonal Appearance of the People armed to defend the Kingdom, and that when they appear, a Computation may be made of what ſhall be ſufficient to furniſh them to ſerve in the Militia.

(2.) The next Point was, Whether there are ſufficient Words in this Charter to exempt the Phyſicians from finding Horſe and Arms, as well as from their perſonal Service in the Militia; and as to that Matter 'tis to be obſerved, that the Charter recites the Statutes of H. 8. and Jac. 1. and that the Regulations therein wanted ſome new Exemptions, and therefore it exempts the Phyſicians from Watch and Ward, and from ſerving on Juries, or bearing or providing Arms to ſerve in the Militia.

'Tis certain, that no Man is bound to bear Arms for another; he may do it voluntarily, or by an Agreement, but not otherwiſe; and if the Word Bearing is ſufficient to exempt a Man from the perſonal Service, the Word Providing muſt be nugatory, if it doth not exempt him from being contributory to the Finding Arms; and ſuch a Conſtruction would make this Charter of no Effect.

(3.) The next Thing to be conſidered is, Whether the Defendant can juſtify under this Warrant, it being to diſtrain for a Penalty impoſed, for not bearing or finding Arms to ſerve in the Militia; now this is offered by the Defendant as one entire Cauſe of Juſtification, and as ſuch it muſt be good for the Whole; for if one Part is good and the other bad, then the Whole will be naught; and as to that Matter, one Part is not good, and therefore an entire Penalty as to both can never be impoſed; for if it ſhould, then certainly the Puniſhment would be againſt Law as to that Part which is not good; now one of the Cauſes for which this Penalty was impoſed was naught, (viz.) For not bearing Arms, when by the Statute no Man is bound to bear Arms, if he finds another to ſerve in his Place.

Cro. Eliz. 434. 11 Rep. 42. 1 Saund. 27.

Econtra. On the other Side it was argued, that the Power which the King had to exempt the Subject from the Payment of the Tenths and Fifteenths granted to him by Act of Parliament, doth not come up to this Caſe, becauſe the King had an entire Intereſt veſted in him as to thoſe Things.

So where the Province of Canterbury granted the Tenths to the Crown, and appointed one to collect them, and the

Convocation ordered that no privileged Person should be exempted from being a Collector, yet one who had a Charter of Exemption from the King was excused; this likewise doth not concern the Case now in Question, because the Convocation had not Power to make any Man the King's Purveyor; and the Bill of Rights, Anno 3 Car. 1. doth entirely condemn all those Exemptions.

It hath been admitted on the other Side, that the King could not grant these Charters of Exemption in extraordinary Cases; and that he cannot exempt a Knight from being a Jury-man where a Peer is a Party in the Cause; and certainly it cannot be pretended, that this can be so much for the good of the Publick, as the Defence of the Kingdom by the Militia; and there is a great Difference between Exemptions and Excusing Persons at Discretion.

'Tis true, the King may exempt Men from Pontage or Murage, because such Exemption may be lawfully made in Opposition to that Authority, which take upon themselves to build Bridges, &c. but the King cannot exempt them from being contributory towards the Support of old Bridges, because they were subject to such Contribution prior to any Exemption; so in the principal Case the Charge was vested prior to the Charter of Exemption, and for that Reason it cannot be good. Plow. Com. 487. 12 Rep. 29. W. Jones 106.

There is likewise another Reason why it cannot be good, and that is, because 'tis to exempt Men from that Charge which the Law hath provided for the publick Safety of the Kingdom, in which every Man hath a Benefit; and therefore 'tis reasonable that every Man should be contributory to it.

(2.) As to the second Point; the Words of this Charter exempt the Physicians from bearing or providing Arms to serve in the Militia, which seems to be only a personal Discharge, and that shall be intended by the Word Bearing, and from furnishing himself with Arms, by the Word Providing; but he is not discharged from being contributory to find Arms for another to serve in the Militia.

Besides, the King's Charter cannot exempt a Man from a Thing which concerneth the whole Right of the Subjects, as this Statute doth, for 'tis for the publick Safety of all Men; 'tis true, he may exempt Men from any Thing which concerns his private Right, or which is a Branch of his Prerogative, or wherein he himself is principally concerned; but it doth not follow, that because he may grant such Exemptions, therefore he may exempt where the whole Community are concerned.

Now this Statute doth not bind any Man to a perſonal Service in the Militia, nor is it a Charge on the Perſon, but only in reſpect of his Lands; therefore where a Man is protected in the Poſſeſſion, and quiet Enjoyment of his Lands, he ought in Reaſon, as well as in Law, to be contributory to the Charge of ſuch Protection.

(3.) The laſt Objection was to the Warrant, (viz.) That the Defendant could not juſtify under this Warrant, &c. but it was argued, that the Warrant was good to levy the Penalty for not bearing or providing Arms; it had been otherwiſe if it had been for not ſerving, or finding one to ſerve in the Militia, becauſe he who ſerves is not to contribute to the Finding another to ſerve; but by the Warrant the Penalty was to be levied for not appearing, being duly ſummoned, as well as for not bearing or providing Arms to ſerve; ſo that upon the whole Matter this is a good Warrant, and by Conſequence a good Juſtification under it.

Curia. The Court upon this firſt Argument declared this to be a Cauſe of great Difficulty and Conſequence as concerning the Prerogative of the King, and the general Right of the Subject, and for that Reaſon it ought not to be determined upon a Caſe ſtated, becauſe upon ſuch a Proceeding, the Judgment of the Court would be final, and not to be avoided by the Party who ſhould think himſelf aggrieved either by Writ of Error or Appeal; therefore the Court propoſed that both Parties would conſent to make it a ſpecial Verdict; and that it might be argued once more before Judgment given; upon which a Writ of Error might be brought in Parliament by either Side againſt the Judgment, and there to be finally determined.

But upon this firſt Argument, the Chief Juſtice was of Opinion, that the King by his Prerogative could not diſpenſe with an Act of Parliament which was made for the publick Good of the whole Nation; but the Queſtion in this Caſe was, Whether this Statute had deveſted the King of any Part of his Prerogative, or whether it was made to eaſe him of the Care of arraying the Militia, and entruſting the Lieutenants and other Officers therewith; for if it was, then it did not deveſt him of any Authority he had before the Act.

Now he was of Opinion, that this Charter did not exempt the Phyſicians from being contributory to the finding Men to ſerve in the Militia, tho' probably it might exempt them from any perſonal Appearance upon a Summons duly ſerved; but admitting that he might exempt them

from perſonal Duties; yet it cannot be inferred from thence, that he might exempt them from being contributory to others to perform thoſe Duties which are required by an Act of Parliament, eſpecially where the Subject hath an Intereſt, that ſuch Duties ſhould be performed, or a Loſs if they ſhould not, and the better Opinion ſeemed to be, that the King could not exempt in ſuch Caſes.

That in the principal Caſe, the Contribution to be made to the Finding a Man with Arms to ſerve in the Militia, is a Charge upon the Lands, as well as on the Perſons of the Owners; and if this Charter of Exemption ſhould be good, it would encreaſe the Charge on all the Lands of Perſons not exempted, which would be a very great Damage to ſuch Perſons, becauſe the Phyſicians who are exempted are a conſiderable Body of Men in every County; for which Reaſon it would be very hard if the King had Power to leſſen the Tax impoſed upon on Man, and charge it upon another.

Beſides, the King cannot exempt in any Caſe where the Subject hath an Intereſt, as where particular Perſons are bound by Preſcription or Tenure to repair Bridges, the King cannot exempt them from repairing, becauſe all the Subjects have a common Benefit to paſs and repaſs over publick Bridges.

But it was adjourned for a farther Argument.

The King *verſus* Hutchiſon.

Mandamus to reſtore a Man to his Freedom in a Borough.

THIS was a Mandamus to the Mayor and Common Council of the Borough of Carliſle, to reſtore one Hutchiſon to his Freedom of the ſaid Borough, &c. The Subſtance of the Return was, that he was diſfranchiſed for Bribery at an Election, &c.

v. post 99

And now by his Counſel he inſiſted, that this was not a ſufficient Cauſe to remove him, becauſe Bribery is a Crime puniſhable at Common Law; and 'tis againſt Magna Charta to remove him from his Freedom before he is convicted of the ſaid Crime; if the Law ſhould be otherwiſe, what Security can any Man have againſt the Inſults of Power; but 'tis plain, and ſo it was adjudged in * James Bagg's Caſe, that a Freeman ſhall not be diſfranchiſed, unleſs it be by Charter or Preſcription, if he is not convicted in due Form of Law; and where he may be diſfranchiſed by

* 11 Rep. 93.

Charter or Prescription, and without Conviction, it must be for an Act against his Duty and Oath relating to his Office, or not doing his Office; as a Justice of Peace not attending the Sessions; or where a judicial Officer is a common Drunkard, or for any other Misdemeanor meerly against the Duty of his Office, and which is no Crime at Common Law; for there is a Difference between the doing an unlawful Act, and the not doing his Duty relating to his Office, the one being a Crime, and the other only a Contempt.

Curia. Curia; Bribery is a publick Offence, and the Person guilty of such an Offence may be punished at Law for it; and the Chief Justice at first was of Opinion, that the Defendant might be removed from his Freedom for this Reason, because Bribery is against the Interest of the Corporation, and against the Oath of Fidelity which the Defendant made to them when he was admitted to his Freedom there.

But the better Opinion was, that this was an Offence at Law, and not relating to the Duty of his Office; and therefore he could not be disfranchised before a Conviction, according to the ordinary Course of Law; for if he should first be disfranchised, and afterwards tried at Law for this Crime, and be acquitted, he would suffer Damages without any Remedy.

And there cannot be any Inconveniency in this Proceeding, because the Mayor may have a Writ ad amovendum eum ab officio, &c. quousq; inquisitio foret de ejus gestu.

However, it was admitted in this Case, that the Defendant might be removed before Conviction at Law, if the Offence did relate to the Duty of his Office; and this might be by Virtue of that Power which they have by their Charter to determine amongst themselves what ever shall be against the publick Good of the Corporation, and certainly Bribery is an Offence against their publick Good; but yet to prevent Clashing of Jurisdictions, 'tis expedient that the Party should be convicted at Law before he is disfranchised; to which the Court inclined.

The Lord Coningsby's *Case.*

Motion for a Peer to waive his Privilege. THE Lord Coningsby brought an Ejectment against some of his Tenants, and moved for a Trial at Bar; thereupon the Defendants by their Counsel moved, that

the Plaintiff being a Peer of the Realm, and conſequently not to be attached, if the Verdict ſhould be againſt him; therefore that he might be obliged to make ſome reſponſible Perſon to be his Leſſee, or otherwiſe that he would waive his Privilege.

But the Court rejected the Motion, for if the Plaintiff was not worth any Thing, he could not be obliged ſo to do; and it would be unreaſonable that his Peerage ſhould be a Loſs to him, ſince every Subject hath a Right by Birth to ſue in the King's Courts, where no Diſtinction is to be made of Perſons.

Sunday not a Day to plead.

There was another Cauſe in the Exchequer in Trinity-Term following between the ſame Perſons, only in that Cauſe, the noble Lord was Defendant; and by Rule of Court made on a Thurſday in the ſaid Term, it was ordered that the Defendant ſhould plead in four Days after, and the Plea came into the Office on Tueſday after, and not before, which the Attorney for the now Plaintiffs refuſed; and it was inſiſted on by their Counſel, that it ought not to be received; for though by the Courſe of the Court, the Defendant hath four Days excluſive to plead; yet ſuch Cuſtom will not warrant five Days excluſive, which was this Caſe, becauſe Sunday ſhall be reckoned as one of the Days, as well as it is one of the fourteen Days where Notice is given of a Trial; 'tis true, Pleas have been received on the 5th Day, but never where the Matter was conteſted.

Curia.

The Court anſwered, that the Pleas which are now put into the reſpective Offices of the ſeveral Courts were originally pleaded in Court; and that the Defendant may as well plead on the firſt, as on the ſecond Day, or the fourth Day; but that now by the Courſe of the Court, if the Defendant doth not plead within four Days, the Plaintiff may ſign Judgment for Want of a Plea; but thoſe four Days muſt always be reckoned ſuch Days wherein the Defendants may plead, and when the Offices are open; and therefore Sunday is never reckoned one of thoſe Days, becauſe neither Courts or Offices are then open.

And this is not like the Caſe mentioned on the other Side, where Sunday is reckoned one of the fourteen Days for giving Notice of Trial, becauſe a Man may prepare for his Journey, or come up to London on that Day, as well as on any other Day of the Week; and for this Reaſon it was reſolved, that the Plea ſhould be received.

Nota;

Charter or Prescription, and without Conviction, it must be for an Act against his Duty and Oath relating to his Office, or not doing his Office; as a Justice of Peace not attending the Sessions; or where a judicial Officer is a common Drunkard, or for any other Misdemeanor meerly against the Duty of his Office, and which is no Crime at Common Law; for there is a Difference between the doing an unlawful Act, and the not doing his Duty relating to his Office, the one being a Crime, and the other only a Contempt.

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Nota;

* Salk. 624. Nota; This is contrary to the Case of * Ashmole *versus* Serjeant Goodwin, where it was held, that as to Rules of Pleading, Sundays and Holydays should be accounted as other Days of the Week.

Mr. Lister's *Case*.

Agreement between Husband and Wife to live separately.

MR. Lister married with the Lady Rawleigh, and afterwards there being some Disagreement between them, he by a proper Writing duly executed, covenanted to allow her so much every Year for her Maintenance, and that she might live separately from him, to which she agreed, and accordingly they lived apart for some Time; but the Husband desiring to be reconciled to his Wife, she refused; whereupon he with another Person who assisted him, forced her into a Coach as she was coming from Church on a Sunday, and carried her into the Mint.

And now she being brought into Court by Habeas Corpus, her Husband moved by his Counsel, that the Court would not interpose between Husband and Wife; that she could not deny her self to be his Wife; and that by Law the Husband hath a coercive Power over the Wife.

Curia. An Agreement between Husband and Wife to live separate, and that she should have a separate Maintenance, shall bind them both, till they both agree to cohabit again, and if the Wife is willing to return to her Husband, no Court will interpose or obstruct her.

But as to the coercive Power which the Husband hath over his Wife, 'tis not a Power to confine her; for by the Law of England she is entitled to all reasonable Liberty, if her Behaviour is not very bad; and therefore she shall now be set at Liberty if 'tis her Pleasure so to be: She answered, that she desired to be at Liberty; and thereupon she was discharged out of the Custody of her Husband, and went out of Court with her Son; but that he (the Husband) should have Leave to write to her, and to use any lawful Means in order to a Reconciliation, provided she was willing to see him, and that her Children or Servants should not hinder him, unless by her Order; but that when ever she permitted him to come to her, he should not offer any Violence or uncivil Behaviour to her Person.

Smith *verſus* Trigg.

THIS was a Caſe referred out of the Court of Chancery, for the Opinion of this Court, and the Point was, Whether one Jane Dee took the Lands in Queſtion, either by Purchaſe or Deſcent.

Lands where they ſhall be taken by Purchaſe, and where by Deſcent.

The Caſe was thus, (viz.) Hugh Hunt being ſeiſed in Fee of Copyhold Lands, ſurrendered the ſame to the Uſe of his Will; and afterwards he deviſed theſe Lands to his Wife Jane Hunt, and died, after whoſe Death the Widow was admitted, to her and her Heirs, &c. and not long after, ſhe married John Trigg, and then ſhe ſurrendered this Copyhold Eſtate to the Uſe of her Will, and deviſed the ſame to her Daughter Jane Trigg, who was never admitted; the Queſtion was, Whether Jane the Deviſee took by Deſcent, or by Purchaſe; for if by Purchaſe, then the Defendant Trigg being of her Blood hath a Right; but if ſhe took it by Deſcent, then the Plaintiff, being of the Blood of her Mother the Teſtatrix, hath the Right.

And it was reſolved, that Jane was in by Deſcent, becauſe ſhe was Heir at Law to the Teſtatrix; and that where two Rights meet together in one Perſon, (as they did in this Caſe) the one being by the Deviſe, and the other by Deſcent as Heir at Law, the Deſcent is the moſt noble Means to come to an Eſtate; and therefore the Law adjudges, that the beſt Title ſhall ſtand.

So where a Feoffment is made to ſeveral Uſes, the Reverſion in Fee to the Heirs of the Feoffor, in ſuch Caſe the Heir ſhall take the Reverſion by Deſcent, becauſe it was Part of the old Eſtate of the Feoffor; for ſo much of the Uſe of the Lands which he did not diſpoſe by the Feoffment ſtill remained in him as Part of the old Eſtate. 1 Inſt. 22. *b*. 23. *a*.

But in the Caſe of a Will, if a Man deviſe any other Eſtate to the Heir at Law than what he was to take by Deſcent; as for Inſtance, if the Teſtator deviſeth a leſs Eſtate to him, or an Eſtate in Fee to ariſe upon a Condition, there 'tis otherwiſe.

DE

DE
Term. Sanct. Hill.

Anno 7 Georgii, 1721.

Button *verſus* Heyward & ux'.

Caſe for ſlanderous Words.

THE Plaintiff brought an Action on the Caſe againſt the Defendants for ſlanderous Words ſpoken by the Wife, (viz.) George Button (the Plaintiff) is the Man who killed my Husband, her firſt Husband being dead; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that theſe Words are not actionable,

Moor 573. 2 Cro. 306. Sid. 71. and ſeveral Book-Caſes were cited to prove it, as where an Action was brought, for theſe Words:

ſſ. She's a Blood thirſty Whore, and hath killed T. S. Adjudged not actionable.

Cro. El. 49. 270, 883. 4 Rep. 15. 2 Cro. 166. Cro. Car. 489. 1 Lev. 274. 2 Lev. 150. Salk. 695. And ſeveral Books were cited to prove that the Words are actionable, all which are in the Margin.

And the Court was of Opinion, that theſe Words were actionable, for ſhe by whom they were ſpoken, averred the Death of her Husband; and as to the Caſes cited to prove theſe Words are not actionable, diſtinguenda ſunt Tempora, for in thoſe Days People were very litigious; and therefore the Judges diſcouraged Actions for ſlanderous Words; but now too much Liberty is taken to abuſe People with their Tongues; and therefore they ſhould be reſtrained by Juſtice,

* 1 Vent. 117. ſo that now any Words * maliciouſly ſpoken ſhall be taken in malam partem; for the Uſe of Words is to expreſs the Mind, and ſhould be always intended as they are underſtood by indifferent Perſons; and as to this Matter the Authorities cited

T. Jones 144. 1 Sid. 52. in the Margin are full in Point; ſo Judgment was given for the Plaintiff.

Spiller *verſus* Adams.

THE Plaintiff brought a Writ of Dower againſt the Dedant who was then an Infant, and admitted ad proſequendum by his next Friend, and pleaded Uncore priſt; and Judgment being given againſt the Plaintiff in the Common Pleas, ſhe brought a Writ of Error in B. R. and aſſigned the Matters following for Error. Infant admitted *ad proſequendum.*

(1.) Firſt, That the Admittance ad proſequendum per Prochein Amy was wrong, for it ſhould be ad defendendum per Guardianum.

To which it was anſwered and ſo reſolved by the Court, that true it is, an Infant often defends per Prochein Army; but yet an Admittance ad proſequendum is good, even where he is Defendant; for 'tis to proſecute his Plea by which he defends himſelf againſt the Plaintiff.

(2.) Then it was objected, that Damages were given to the Defendant, which ought not to be done, becauſe he pleaded Uncore Priſt, which is no Plea in Dower, unleſs an actual Aſſignment was made. In Dower *Uncore Priſt* is a good Plea.

To which it was anſwered and ſo ruled, that Damages in this Caſe were well given, tho' the Defendant had pleaded Uncore Priſt, becauſe Damages may be given occaſione detentionis dotis.

(3.) It was objected, that tho' Damages might be given in this Caſe, yet it ought not to be upon the Judgment quod recuperet dotem, this being in a real Action; for before the Statute of * Glouceſter no Damages were allowed in a real Action; therefore the Damages ought to be given from the Time of the Diſſeiſin till after the Writ of Inquiry returned by the Sheriff, if there was no wilful Delay by the Demandant. * 6 E. 1. c. 1. 10 Rep. 117. Raſt. Ent. 399. 2 Cro. 140. Salk. 108.

To which it was anſwered and ſo reſolved, that by the Statute of † Merton cap. 1. the Widow in a Writ of Dower ſhall recover the Value of her Dower in Damages from the Death of her Husband to the Day that ſhe recovers the Dower it ſelf; that is, uſque diem quæ ipſe recuperaverit per judicium Curiæ ſeiſinam ſuam, which by Intendment of Law is the Day on which ſhe had Judgment quod recuperet dotem, for from that Day ſhe is accounted in the Poſſeſſion or Seiſin of her Dower. † 20 H. 3. *See* 1 Inſt. 37. Dier 378. Brownl. 217. 2 Cro. 640. Sid. 446. 1 Vent. 93. Lutw. 719. 2 Sand. 94.

So the Judgment was affirmed.

Read *verſus* Marſhall.

Husband alone may have an Action for beating his Wife. *pout. 312*

THE Husband brought an Action of Treſpaſs againſt the Defendant for breaking and entring his Houſe, and beating his Wife; the Defendant pleaded in Abatement, that the Wife was not joined with him in this Action; and upon a Demurrer to this Plea, it was inſiſted for the Defendant, that the Husband alone cannot maintain an Action for beating his Wife; but that ſhe muſt be joined in the Action, unleſs he alledge in his Declaration, that by the Beating conſortium amiſit uxoris; the Law is the ſame as to the Beating his Child or Servant.

Curia. *her.*

But the Court was of Opinion, that the Action was well brought by the Husband alone; for if the Action had been for beating his Wife, and taking away his Clothes, he might have maintained ſuch Action alone without his Wife; ſo where he hath another Cauſe of Action, he might give the Beating in Evidence to aggravate the Damages, as where an Action on the Caſe was brought for Words ſpoken at one and the ſame Time, whereof ſome were actionable, and ſome not; there * Damages may be aſſeſſed entirely, for it ſhall be intended to be given for the Words which were actionable, and that the Words which were not actionable ſhall aggravate the Damages.

* 10 Rep. 131. 2 Cro. 598. 1 Salk. 119.

Cro. Car. 90.

So here the Husband alone may maintain an Action againſt the Defendant for Breaking and Entring his Houſe; and the Beating his Wife may be given in Evidence to aggravate the Damages in committing this Treſpaſs.

The King *verſus the* (*Duke*) *of* Powis. *Marquis*

Outlawry for High Treaſon reverſed on a Writ of Error.

UPON a Writ of Error to reverſe an Outlawry for High Treaſon, the Error aſſigned was, that the Proceſs of Outlawry againſt the Duke was directed to the Sheriff of London, when he (the Duke) lived in the Pariſh of St. Giles, in the County of Middleſex, which is an Error in Fact; for the Proceſs of Capias muſt be always directed to the Sheriff of the County where the Party lives, and for this Reaſon the Outlawry was reverſed.

The Case of the Dean and Chapter of Trinity-Chapel *in* Dublin.

Mandamus by an Archdeacon to be restored to his Seat in the Choir, a Writ of Error will not lie upon it.

THE Dean and Chapter, &c. denying Dr. T. S. the Archdeacon of, &c. his Seat therein, and his Voice in the Chapter; he brought a Mandamus in the King's Bench in Ireland, directed to them, suggesting that his Predecessors Time out of Mind, had enjoyed the said Liberty, and that the Franchises and Liberties of their corporate Body were confirmed by Letters Patent of H. 8. &c.

The Dean and Chapter made a Return to the Effect following, (viz.) That by the same Letters Patent they had Power to make By Laws for the Benefit of their corporate Body; and that they made a By-Law on such a Day, &c. that no Person should be admitted a Member of their Body, unless he had taken the Oaths of canonical Obedience, and to keep the Secrets of the said Chapter, which the Archdeacon denied to take; and thereupon they refused to admit him.

This Return was adjudged insufficient in the said Court in Ireland; whereupon they granted a peremptory Mandamus, and then the Dean and Chapter brought a Writ of Error in the King's Bench here.

And it was argued in their Behalf.

(1.) First, That the Cause of Denial, as returned by them, was a good and sufficient Cause.

(2.) That a Mandamus was not the proper Remedy for the Archdeacon in this Case.

As to the first Point the Court adjudged, that the Dean and Chapter had not returned a sufficient Cause, but that they had usurped a Jurisdiction, by tendring or requiring an Oath to be taken, which could not be done but by a Court of Judicature, or by some special Words in Letters Patent, giving them Authority so to do, which Authority could not be implied by any general Words, expressing their Power to make By-Laws.

But the chief Point was, Whether a Writ of Error would lie upon a peremptory Mandamus.

And it was argued for the Dean and Chapter, that a Mandamus would not lie, because it was a prerogative Writ, upon which the particular Right of the Subject was never yet determined; for 'tis grantable by the Court only in Cases of Poph. 176. 1 Mod. 84. 83

a publick Nature for ſettling the Poſſeſſions of Men, and not between any Parties in Intereſt, and therefore no Reſtitution can be granted upon this Writ; 'tis no more than a Command to a Perſon to do his Duty, as to admit another to an Office, or to ſome Freedom, or to ſome Place or Freedom, which belongs to him to whom 'tis granted, and for which he hath no Remedy by any other Action. Now in the principal Caſe, as to a Place in the Chapel and Voice in the Chapter,
1 Lev. 291. 'tis no more than a Franchiſe belonging to the Office of Archdeacon, for which no Aſſiſe, Ejectment, or Quare Impedit will lie; and tho' he might maintain an Action of Treſpaſs on the Caſe for it, yet that is no Remedy, becauſe in ſuch Caſes Damages are only to be recovered, and not the Franchiſe it ſelf.

Roll. Abr. 481. 1 Lev. 119. 1 Vent. 188. Jones 199. 'Tis true, a Mandamus will lie to reſtore a Man to his Priority of Freedom; it may be directed to a Biſhop to induct a Man into his Prebend, and to give Oil to a Prieſt in Baptiſm; but ſuch Writs, and others of the like Nature, ſhall never be controlled by Writs of Error, for if they ſhould, many Inconveniencies would follow, becauſe 'tis uſual to grant a Mandamus to Pariſh-Officers, and to Magiſtrates to deliver the Enſigns of their temporal Offices; or to command them to do their Duty in their reſpective Offices; and if Writs of Error would lie on ſuch Commands, it would admit of unſufferable Delays.

A Writ of Error was never yet granted where a Fine was impoſed by any Court of Juſtice, nor on the Return of an Habeas Corpus; in both which Caſes the Properties and Liberties of the Subject are concerned; and if 'tis not grantable in a criminal Action, where a Man is deprived of his Liberty, there can be no Reaſon why it ſhould be granted in a Civil Action, as in this Caſe; 'tis true, this Matter was conteſted in the Caſe of the Conſtables of Ailsbury, (viz.) Whether a Writ of Error would lie upon the Return of an Habeas Corpus, but it was not determined.

* 9 Annæ, cap. 20. By which 'tis enacted, that the Proſecutor may 'Tis likewiſe true, that by a late * Statute, a Traverſe is given to the Return of a Mandamus, as if it had been an Action on the Caſe; but yet that doth not make it an Action on the Caſe.

plead to, or traverſe the Facts in the Return; and the Perſon who made the Return may take Iſſue, or demur.

On the other Side it was argued, that tho' in this Caſe a Writ of Error would not lie upon the firſt Mandamus, becauſe it was in the Nature of an interlocutory Judgment,

and no more; yet it muſt lie upon this peremptory Mandamus; for tho' it was formerly but a Letter from the King, yet now it hath obtained the Sanction of an original Writ; and like ſuch Writ, if it bears Teſte out of Term, 'tis void.

The Reaſon of the Law ſeems to be plain, that a Writ of Error will lie upon a peremptory Mandamus, for it will lie upon any Judgment by which the Defendant conceives himſelf to be aggrieved or damnified, unleſs he hath another proper Remedy for Relief; but the Dean and Chapter in this Caſe have no Remedy but by a Writ of Error, for if their Return to the firſt Mandamus was good, and ruled to be otherwiſe, they are pinned down by ſuch Judgment; and tho' they are wronged by it, they have no Remedy. 1 Lev. 91. 1 Vent. 205, 212, 266. Sid. 44. 1 Mod. 258.

The Court was of Opinion, that the Right of any Perſon was not to be determined upon a Mandamus; it gives a Remedy where there is a ſeeming Probability for it, and it ſettles People in their Poſſeſſions, ſo that they may be able to defend their Right, or by Virtue thereof to bring any Action for Things incident to the Poſſeſſion; and if a Writ of Error ſhould lie in ſuch Caſes, it would entangle all the publick Acts of annual Officers in moſt Corporations and Pariſhes. Curia.

'Tis againſt the Nature of a Writ of Error to lie on any Judgment, but in Cauſes where an Iſſue may be joined and tried, or where Judgment may be had upon a Demurrer, and Joinder in Demurrer, and therefore it would not lie on a Judgment for a Procedendo, nor on the Return of an Habeas Corpus.

'Tis true, if the Defendant in Error had traverſed the Return of the Dean and Chapter to this Mandamus, as by the Statute 9 Annæ he might, in ſuch Caſe the Writ of Error would have been good, becauſe then a final Judgment might be given; for upon the Traverſe of the Facts in the Return, the other Side may take Iſſue or demur; and ſuch Proceedings might be had, as if the Proſecutor of the Mandamus had brought an Action on the Caſe for a falſe Return; and if he had a Verdict or Judgment on a Demurrer, he ſhall recover his Damages and Coſts, upon which Judgment a Writ of Error would lie; but it was never yet determined that it would lie upon a peremptory Mandamus; and therefore it was reſolved by the whole Court, that it would not lie.

Afterwards a Writ of Error was brought on this Judgment in the Houſe of Peers; and the Lord Chief Baron, who attended there, together with ſeven other Judges, acquainted the Lords in Parliament, that all the Judges of England were of Opinion, that a Writ of Error would not lie, and

and thereupon 21 Aprilis, 10 Georgii, Anno 1724. the Judgment of the Court of King's Bench was affirmed.

Muck's *Case*.

Action for ſcandalous Words.

AN Action on the Caſe was brought by againſt Muck for ſlanderous Words, (viz.) Muck ſtole a Sheep of his (innuendo of the Plaintiff), and that it was not the firſt he ſtole by an Hundred; upon Not guilty pleaded, the Plaintiff had a Verdict; and the Defendant moved in Arreſt of Judgment, that the Words were not actionable, (viz.) Muck ſtole a Sheep of his, which muſt be intended Muck's own Sheep, for the Particle His muſt refer ad proximum antecedens, which is Muck, ſo that theſe Words are repugnant; for a Man cannot ſteal his own Sheep; like the Caſe in Roll. Abr. 74. where an Action was brought againſt Huſband and Wife, for Words ſpoken by the Wife, (viz.) That the Plaintiff ſtole ſome of her Goods: Adjudged not actionable, becauſe a married Woman cannot have any Goods, for they are the Goods of the Huſband.

But in the principal Caſe the Court over-ruled the Objection, and held the Words actionable as laid in this Declaration.

Carvell *verſus* Manly.

Where a Plea need not conclude *prout patet per Recordum.*

IN an Action of Falſe Impriſonment, the Defendant who ſued out the Writ juſtified under it; and upon a Demurrer to his Plea the Plaintiff had Judgment in the Common Pleas, becauſe the Juſtification was under a Writ taken out at ſuch a Time, and the Defendant did not conclude his Plea with Prout patet per Recordum, nor traverſe that he did impriſon the Plaintiff at any other Time; and now upon a Writ of Error in B. R. upon that Judgment, the Error aſſigned was, the Want of a good Original; 'tis true, there was an Original, but it was not returned, and therefore it is void.

To which it was anſwered, that there are two Sorts of Returns, one made on the Roll, and the other by the Sheriff; now tho' there was no Return made by the Sheriff on this Original, yet there being one filed on the Roll, and certified from thence as returned, that is ſufficient to make it a good Original.

And as to the Objection againſt the Plea, (viz.) That the Defendant had juſtified under a Writ, and did not conclude

prout patet per Recordum; and that he had not traverſed the Impriſonment at any other Time, than upon the Writ ſued out at ſuch a Time; it was argued, that if the Action had been brought againſt the Sheriff, and he had juſtified under the Writ, he muſt have concluded his Plea with prout patet per Recordum, becauſe it would not have been a Record, if he had not returned the Writ; but though he never returned it, 'tis ſtill a good Juſtification for the Defendant in this Action.

But 'tis not abſolutely neceſſary for a Defendant to conclude his Plea with prout patet per Recordum, becauſe a Writ may be loſt.

And as to the other Objection, that the Defendant did not traverſe the Impriſonment at any other Time, &c. that is only Surpluſage; for if the Juſtification is good, the Traverſe would be wholly immaterial. 1 Lev. 211. 3 Lev. 227. Lutw. 1452.

The Original gives Juriſdiction to this Court, and by Conſequence if that is not returned, the Court hath no Juriſdiction in this Caſe; and the Cauſe cannot properly be ſaid to be in Court; but if the Sheriff never returned the Writ, how could the Defendant in this Action plead prout patet per Recordum; therefore his Plea muſt be good without ſuch Concluſion, and if his Plea is good, then the Traverſe would be immaterial; ſo the Judgment in the Common Pleas was reverſed. Curia.

Glynn *verſus* Yates.

Bail are liable where the Principal died before the Return of the ſecond *Scire facias*.

THE Caſe was, ſ. The Principal died not having ſurrendered himſelf before the Return of the ſecond Scire facias; and upon a Motion, the Queſtion was, Whether the Bail are liable to the Debt.

It was argued againſt them, that they were liable, for in Strictneſs of Law, upon a Capias awarded and filed againſt the Principal, and non eſt inventus returned, the Bail afterwards are liable; 'tis true, by the Favour of the Court, they have Time to render the Principal till the Return of the ſecond * Scire facias againſt them; and therefore that Matter ought to be pleaded to the Scire facias, and not to be allowed upon a Motion; but it cannot be pleaded, becauſe 'tis not Law. * Moor 775. 1 Roll. 336. 2 Cro. 97, 165. Bulſt. 331. W. Jones 138. Hob. 210. Raym. 14. 6 Mod. 289.

To which it was anſwered, that if 'tis not Law, and therefore not to be pleaded, 'tis the greater Reaſon that it ſhould be determined upon a Motion; for the Death of the Principal

Principal being the Act of God, it shall never be prejudicial to the living, and the Plaintiff hath no Damage by the Death of the Principal, because he might have died if he had been in Gaol; but it would be a great Damage to the Bail, if they should not be discharged by his Death.

Curia. The Bail are bound by their Recognisance to render the Principal where Judgment is had against him, or to pay the Condemnation Money, but by the Course of the Court, the Principal hath Time to render himself in Discharge of the Bail till the second Scire facias against them is returned; and here the Act of God intervened, (viz.) The Principal died, so that he could not render himself within that Time.

'Tis true, the Grace of the Court is usually extended to the Bail, where the Principal did surrender himself, but never where he did not; this was the Course of the Court when Popham was Chief Justice, but it was altered by my Lord Coke, and altered again in Crook's Time; that if the Principal did surrender himself before the Return of the second Scire facias against the Bail, they should be discharged; but the Indulgence of the Court never extended farther.

Cro. El. 738. Salk. 101.

'Tis wrong to say, that the Plaintiff hath no Damage by the Death of the Principal dying before the Time he had to surrender himself; for 'tis seen by daily Experience, that Men will pay their Debts rather than be committed; and so might the Principal in this Case, rather than to be rendered in Custody.

Besides, the Plaintiff is a Stranger to the Bail, and there is no Trust or Privity between him and them; but there is a great Trust between the Principal and the Bail, so that it seems very reasonable they should suffer in this Case rather than the Plaintiff, who is an innocent Person; for 'tis probable they may have Counter-Security from the Principal to indemnify them; and therefore 'tis more proper for them, than for the Plaintiff, to sue his Executor or Administrator upon such Counter-Security; for 'tis to be presumed, that by Reason of that Trust which is between them, they may know more of his Concerns than 'tis possible for the Plaintiff to know.

So Judgment was given for the Plaintiff against the Bail.

4

Atkinson

Atkinſon *Executrix*, &c. *verſus* Coatſworth.

UPON a Writ of Error on a Judgment in an Action of Covenant, the Caſe was, ſ. One Snell by Indenture of Leaſe demiſed Lands to Atkinſon the Teſtator for a certain Term of Years, rendring Rent, and performing other Covenants therein mentioned; and afterwards Atkinſon made an Under-Leaſe of the Premiſes to the Defendant Coatſworth, who therein covenanted with the ſaid Atkinſon to perform and keep all the * Covenants in the original Leaſe, to be kept and performed by the ſaid Atkinſon, his Executors, &c. or Aſſigns. Eſtoppel where 'tis good. * Of which the Payment of the Rent was one.

Afterwards Atkinſon having made his Wife (the now Plaintiff Executrix) died; and the Rent reſerved on the original Leaſe not being paid, ſhe the ſaid Executrix brought an Action of Covenant againſt the Defendant Coatſworth, and aſſigned for Breach the Non-payment of the Rent, &c. and upon the general Iſſue pleaded, the Cauſe was tried at the Aſſiſes in Durham, and the Plaintiff had a Verdict and Judgment; and upon a Writ of Error brought by the Defendant, the Error aſſigned was, for that the Plaintiff in her Declaration had not ſet forth, that Atkinſon her Teſtator did execute the original Leaſe on his Part, for if it was not ſigned and ſealed by him, then it was not his Deed; 'tis true, it being executed by Snell, it had all the eſſential Qualities of a Deed; but it doth not follow from thence, that it was the Deed of the Teſtator, and by Conſequence the Defendant ſhall not be bound by a Covenant relative to ſuch Deed.

If it ſhould be objected, that the Defendant in this Caſe is eſtopped by his own Deed (made between him and Atkinſon) to ſay that the original Deed is not the Deed of Atkinſon, becauſe that very original Deed is recited in his own Deed; the Anſwer is, that this general Eſtoppel doth not bar him from ſaying, that by the firſt Leaſe there is no Rent reſerved, or to be paid by Atkinſon; for the Defendant is to perform no more than thoſe Covenants which were to be performed by Atkinſon, and the Plaintiff muſt ſhew what thoſe Covenants are before ſhe can be entitled to this Action.

On the other Side it was agreed for her, that by her Declaration ſhe hath ſet forth, that per indenturam factam inter partes prædict' Atkinſon did covenant, &c. Now theſe Words imply, that the Indenture was executed by him on his Part; and therefore ſhe need not ſet forth all the Circumſtances of Econtra.

signing, sealing and delivering, because her alledging that it was made inter partes prædictas implies all the Rest.

4 Leon. 173. 1 Lutw. 333.

So where the Plaintiff declared, that the Testator devisavit, or that the Feoffor feoffavit, &c. these Words imply all other Requisites either to a Will or a Feoffment; and if so, then facta in this Case implies all Requisites to the Making an Indenture, and convenit all Requisites to the Making a Covenant.

Besides, the original Indenture being recited in the other in which the Defendant covenanted to perform all the Covenants therein, which on Atkinson's Part were to be paid, done or performed; he is now barred to say there are no such Covenants in the original Lease, because he hath allowed it to be an Indenture, and with such Covenants.

Curia.

The Substance of the Objection is, that the Plaintiff hath not set forth in her Declaration, that the original Indenture was signed and sealed by Atkinson on his Part, or that it was his Deed; for if it was not, then the Defendant is not bound to perform the Covenants therein contained; but the Plaintiff hath alledged, that it was an Indenture facta inter partes prædictas, which implies that both Snell the original Lessor, and Atkinson likewise signed the Deed; and so it became the Deed of both Parties; for where an Indenture is made between two Parties, that must be implied, and the other Circumstances of sealing and delivering it as his Deed, need not be set forth.

Moor 23. Poph. 115. 1 Roll. Abr. 872.

And as to the Estoppel, 'tis very full against the Defendant, for he hath covenanted in the second Lease to perform all the Covenants in the original Lease, which on Atkinson's Part were to be paid, done or performed, by which he is now estopped to say, that there are no such Covenants in the original Lease.

So the Judgment was affirmed.

The King *versus* The Mayor and Common Council of Bedford.

Election of a Burgess not qualified set aside.

THERE being a Rule of Court made against the Mayor and Common Council-Men of Bedford, to shew Cause why an Information should not be filed against them, for an undue Election of a Burgess of the said Borough; the Case appeared to be thus:

If. The Town of Bedford is a Borough by Prescription, and Time out of Mind, on the Monday next after Bartholomew Day had put up 26 Burgesses, in Nomination out of which they chose 13 Common Council-Men, who, when chosen, had Votes in electing a Mayor and other Officers in the said Borough; but at the last Election, on Monday after Bartholomew Day, they put one Benson in Nomination with 25 more, who were Burgesses, but Benson was not, he being only a Freeman of the said Borough; and he was chosen by the Majority of the other 25 Burgesses, to be one of the 13 Common Council-Men.

Afterwards, the Mayor finding that Benson was not qualified to be one of the 26 Burgesses, for the Reason beforementioned, proceeded to a new Election, and then they chose one Deveureux to be a Burgess in the Room of Benson; and now Hughes, who was one of the other 25 Burgesses, and put in Nomination, as aforesaid, and who was duly qualified, and had most Votes to be a Common Council-Man next to the said Benson, prosecuted an Information against the Mayor and the 12 Common Council-Men, as not being chosen by 26 qualified Burgesses; for that Benson, one of the 26, was a Freeman and no Burgess, and therefore the whole Election void, as not warranted by the Custom of the Borough.

But the Counsel for them insisted, that the Rule might be discharged; for when an Election is made by several Persons, whereof some are qualified to chuse, and some not, 'tis good as to the Persons qualified; for if it should be otherwise, and the Election wholly void, and that they cannot re-elect, there would be an End of this Borough by Prescription, for then they can neither have Burgesses nor Common Council-Men, who are to name the Bailiffs, and who have Votes at the Election of a Mayor.

Therefore to avoid this Inconvenience, if one unqualified Person is chosen, they may elect another who is qualified, as soon as they understand he is unqualified; and this hath been the constant Course in this Borough.

But this was denied by the Counsel for the Prosecutor, for they insisted, that where an Election is made by one or more Persons unqualified; if 'tis void as to the Person elected, yet he who hath most Votes next to the unqualified Person elected, shall be deemed duly chosen.

'Tis true, where Persons apparently unqualified are nominated, or put up for Candidates, in such Case an Election made by or out of such Persons, is intirely void, because 'tis an undue Election, and shall not stand for any Part, especially

when by the Custom of the Place, such a determinate Number of qualified Persons are to chuse.

Now in this Case, one of the Persons nominated to be a Burgess, being only a Freeman, and no Burgess, and the Choice of Common Council-Men being to be made on a certain Day, and by a particular Number of Burgesses; if 'tis not made on that Day, nor by that Number, the whole Election is void, and not as to the unqualified Person alone; for if he had not been put in Nomination as a Burgess, he might have voted as a Freeman, the Benefit whereof was by this Means lost, both as to himself and his Friends.

'Tis true, in some Cases the Borough might proceed to a new Election, as where the Person chosen did not receive the Sacrament within a Year, &c. or where he had not taken the Oaths, &c. because these are Disabilities which arise after the Election, and might not be known before; but where the Disability is apparent before the Election, as it was in the principal Case, then 'tis void from the very Beginning.

Curia. The Court declared, that what was insisted on by this Motion for the Prosecutor would introduce a great Inconvenience, for if this should be adjudged a void Election as to the Whole, then the Borough would be destroyed, for there cannot be any other Mayor, or any Thing done by Common Council-Men;

Therefore if some unqualified (as Benson was) are put in Nomination with those who are qualified, as the other 25 were, and the unqualified Person is chosen (as Benson likewise was) it avoids the Election as to him only, and not to the other 12 Common Council-Men who were duly chosen and qualified; and where there is no Fraud, but a plain Mistake, the Re-election of a qualified Person shall be good.

This was the Opinion of the Chief Justice and Two other Judges, but the Fourth differed in Opinion, for it was not clear to him how 13 Common Council-Men, who by the Custom of the Place were to be chosen out of 26 qualified Burgesses, could be lawfully chosen out of 25, for they might as well be chosen out of any other Number, if once the Custom is broken.

However, he was of Opinion, that Hughes, who had the most Votes of the 25 Burgesses duly qualified, next to Benson who was not qualified, was duly chosen; therefore, that the Plaintiff complaining ought not to be hindered to try his Right upon this Information.

This being upon the first Motion, and the Court being not all of one Opinion, the Rule was enlarged as to the Person re-elected, and discharged as to the rest.

And afterwards, on another Day, and upon another Motion to set aside the Rule as to the Person re-elected, the Question was, If one who is unqualified is chosen by a Majority of those who are qualified, and his Election is made void, because he is unqualified; then whether a Person who is qualified, and hath the Majority of Votes next to him who is not qualified, shall be adjudged duly chosen, or whether they must proceed to a new Election.

And it was insisted, that Hughes, who was qualified, and who had the most Votes next to Benson, who was not, but yet was chosen, shall be deemed to be a duly elected Burgess, and the new Election of Deveureux shall be void and set aside.

'Tis no Excuse to say, that they did not know Benson was not qualified at the Time he was chosen Burgess, because it was in their Power to be duly informed of the Truth, for they had all the Borough-Books in their Custody; and Ignorance can be no Excuse where they had all the Means of knowing the Truth amongst themselves.

Therefore all the Votes given to Benson were thrown away, and he who had most Votes next him is duly elected, and the Borough ought not to have proceeded to a new Election.

But the Court held the new Election to be good, as well for the Mistake in not knowing Benson was no Burgess, but a Freeman at the Time of his Election to be a Common Council-Man, as for avoiding an Inconvenience, which otherwise would be incurable; so the Election of Deveureux was held good, and the Rule discharged. Curia.

DE

DE
Term. Paſchæ,
Anno 7 Georgii, 1722.

The King *verſus Inhabitants of* Brickhill.

Payment of Taxes, tho' not charged perſonally, but only by the Name of Occupier of a Tenement, makes a Settlement.

TWO Juſtices of the Peace made an Order to remove one Green, and his Wife and ſeven Children, from the Parish of Horewood to the Parish of Brickhill, which Order was confirmed upon an Appeal to the Seſſions; and both the ſaid Orders being removed by Certiorari into B. R. the Caſe appeared to be thus:

ſſ. This Green being a poor Man, lived laſt at Brickhill, at a Place called Roſcoes Tenement, and paid Taxes there by the Name of the Occupier of Roſcoes, and for that Reaſon he and his Wife and Children were ſent thither; and now it was moved to quaſh theſe Orders, becauſe this Man ought to be perſonally charged to pay Taxes; otherwiſe he gains no Settlement by paying them as Occupant of a Tenement, tho' he was likewiſe charged as Farmer thereof at that Time; for that Word Farmer doth not prove him to be Occupant, becauſe he may let the Tenement over to another.

But on the other Side it was inſiſted, that paying Taxes by the Name of Occupant of Roſcoes Tenement, and naming him Farmer of the ſame at that Time, is a ſufficient Deſignation of the Perſon to gain a Settlement there; and the Court being of that Opinion, theſe Orders were confirmed.

The King *verſus Inhabitants of* Rufford.

THIS was a Mandamus to the Juſtices of the Peace, &c. to appoint Overſeers of the Poor in the Town of Rufford, who return that Rufford is an extraparochial Place; and therefore are not to provide for their Poor. The Statute for Relief of the Poor extends to extraparochial Places.

It was objected againſt this Return, that admitting it was true, yet the Juſtices are obliged by the Statute 43 Eliz. cap. 2. to appoint Overſeers of the Poor even in extraparochial Places, becauſe in the enacting Part of the Statute, the Words are general, and extend to all Places, (viz.) That the Churchwardens of every Pariſh, and two or more Houſholders there to be nominated yearly in *Eaſter* Week, or within one Month after, under the Hands and Seals of the Juſtice of the Peace, are to be called Overſeers of the Poor, *&c.*

On the other Side it was ſaid, that the Queſtion in this Caſe was, Whether extraparochial Places are within this Act; for as to the Poor in general, the Common Law leaves them to their own Induſtry, or to the Charity of their Neighbours. Econtra.

And it was argued, that extraparochial Places are not within that Statute.

That the beſt Expoſitors of Acts of Parliament, are the Acts themſelves; now this Act ſays, that the Overſeers of the Poor muſt meet monthly in the Pariſh Church or Chapel, which is a certain Indication, that an extraparochial Place was not comprehended by the Act, becauſe 'tis impoſſible for them to meet in a Church or Chapel where there is none; and there is a Penalty of 20s. inflicted by the Statute, for not meeting in ſuch Place.

If it ſhould be objected, that it may be a great Hardſhip to thoſe who ſhould have a Settlement in ſuch Places, if they were not within this Statute, for then the Poor could have no Relief; the Anſwer is, that it cannot be any Hardſhip, becauſe they may remove to the Place where their Parents were ſettled, and there would be no Hardſhip to any but only to Baſtards born in ſuch Places.

The Court was of Opinion, that extraparochial Places are within the Words of the Statute; for the Juſtices of the Peace by the general Words have Power to name Overſeers in all Pariſhes, which muſt extend as well to extraparochial Places, as to all Pariſhes in general; and no ſubſequent Words ſhall controul the general Words in the enacting Part; and certainly all the Poor Acts ſhould be conſtrued to extend to Curia.

Jones 165. Palm. 485. Cro. Car. 498. Poſtea *The* King *verſus* Althoe S. P.

to ſuch Places, as well as to other Pariſhes, when they are within the ſame Miſchief, and ſhall be ſubject to the Control of the Juſtices of the Peace; and the Penalty for not meeting in the Church ſhall never be inflicted on the Overſeers of the Poor, becauſe the Inhabitants of extraparochial Places have no Church to meet in; moſt of the Foreſts in England are extraparochial, and ſo is Chriſt-Church in Oxford, but they ought to maintain their own Poor; therefore a peremptory Mandamus was granted.

Lock *verſus* Wright.

Mutual Covenants, and of a Condition precedent.

IN Covenant on a South-Sea Contract, the Caſe was: Iſſ. The Plaintiff Lock by a Deed-Poll covenanted to aſſign South-Sea Stock to the Defendant as ſoon as the Books of that Company were open; and the Defendant covenanted in Conſideration thereof to accept the Receipts, and to pay 950l. to the Plaintiff on the 10th of November following.

Afterwards by an Act of Parliament, the Company were prohibited to give any Receipts for ſo long Time; and now in an Action of Covenant brought by the Plaintiff, he declared, that the Defendant, pro conſideratione of the ſaid Stock ſold to him, covenanted to pay 950l. to the Plaintiff at ſuch a Time, and aſſigned the Breach in Non-payment of the Money at the Time, (viz.) on the ſaid 10th Day of November.

Dyer 76. Plowd. Com. 202, 483. 7 Rep. 38. Sand. 320. 1 Vent. 147, 371. Lutw. 490. 3 Mod. 39. 1 Salk. 172.

And upon a Demurrer to the Declaration, for that the Plaintiff had not ſet forth, he did aſſign the Stock, or aver a Tender thereof; it was argued for the Defendant, that this Declaration was ill, becauſe the Plaintiff had not alledged the Performance of the Covenants on his Part, which he ought to have done to entitle him to this Action, it being in the Nature of a Condition precedent, and not of mutual Covenants; to prove which the Authorities in the Margin were cited.

Econtra.

On the other Side, the Counſel for the Plaintiff argued, that this Declaration was good, becauſe the Defendant was to pay the Money on a certain Day; but there was no indefinite Time for the Delivery of the Stock; for that was to be delivered when the Books of the Company were opened; therefore if the Plaintiff was hindered to deliver the Stock before the Day appointed for the Payment of the Money; yet the Defendant ought to pay it on the very Day he had covenanted ſo to do; for this was a Contract executed,

and not executory; and from the very Time of the Agreement the Defendant had Credit for the Stock; 'tis true, he had no Remedy at Law to recover it; but he had a proper Remedy in Equity, and he could have no other, if he had the Receipts, for theſe are only an Evidence that he had ſo much Stock in the Company.

Beſides, this is an Action of Covenant upon a Specialty in which 'tis not requiſite to lay a Conſideration to entitle the Plaintiff to the Action; therefore though he alledged, that he did covenant to aſſign the Stock, &c. and that the Defendant pro conſideratione inde did covenant to pay the Money, this doth not deſtroy the Specialty; for he cannot give ſuch Conſideration in Evidence, at or before the Day of Payment of the Money, being tied up by an Act of Parliament, to which every Man is virtually a Party; and the Covenant on the Defendant's part being to accept the Receipts when ever the Company would give them, and to pay the Money on a certain Day, he ought therefore to pay it on that Day, and not to wait the Time of the Delivery of the Receipts, which by the original Agreement was indefinite.

The Court upon the firſt Argument of this Caſe was of Opinion, that ſince it was agreed by the Counſel for the Plaintiff, that the Defendant had no Remedy for this Stock, but in a Court of Equity, it would ſcarce be allowed, that an equitable Intereſt will be a good Conſideration to ſupport an Action at Law. Curia.

That the Caſe which comes neareſt to the principal Caſe in Senſe happened in the Time of the Chief Juſtice Holt, which was thus, (viz.) A Man hired another for a Year; it was agreed on all Sides, that the Perſon thus hired could have no Action for his Wages till the Year was expired; but if the Maſter had covenanted to pay it on a certain Day within the Year, in ſuch Caſe an Action would lie before the Year was ended; but the principal Caſe goes farther, for there the Conſideration was meerly an equitable Intereſt.

Afterwards in Trinity-Term following, Judgment was given for the Defendant, becauſe this Deed of Covenants being only a Deed-Poll, 'tis for that Reaſon, the Deed of the Defendant only; and therefore the Covenants cannot be mutual, and it would be very hard, that the Plaintiff ſhould maintain this Action for the Money, before he transfers or tenders to transfer the Stock, when the Defendant hath no Remedy to recover it at Law, but only a Right to have it decreed to him in Equity.

Salk. 112, 171.

In all executory Agreements where the Plaintiff declares (as in this Caſe the Plaintiff had done) pro conſideratione inde, there the Word pro makes it a Condition precedent, (i. e.) The Stock muſt be aſſigned or tendered to be aſſigned before the Defendant ſhall be obliged to pay the Money; and neither of the Parties can have an Action of Covenant without averring the Performance on his Part.

* 1 Salk. 112.

So is the Caſe of * Colonel *verſus* Biggs, which was thus, (viz.) An Agreement was made, that the Defendant ſhould pay ſo much Money within ſix Months, the Plaintiff tranſferring his Stock, which he agreed to do, the Defendant paying the Money agreed on; it was adjudged, that if either Party ſue upon this Agreement, the one muſt aver and prove a Tranſfer of the Stock, or a Tender to be tranſferred, and the other muſt aver and prove the Payment of the Money, or a Tender of Payment, becauſe the Tranſferring in the firſt Part of the Agreement is a Condition Precedent, and tho' theſe are mutual Promiſes; yet where one Thing to be done, is the Conſideration for doing the other, the Performance of that Thing muſt be averred; 'tis true, the Book goes farther, (viz.) unleſs there is a certain Day appointed for the Performance which makes it exactly like the principal Caſe.

1 Salk. 172. Lutw. 245.

So where in an Action on the Caſe, the Plaintiff declared, that there being a Diſcourſe of a Mortgage, &c. the Plaintiff did agree to releaſe the Equity of Redemption; and in Conſideration thereof, the Defendant did agree to pay 7 l. then there were mutual Promiſes laid, and the Plaintiff averred the Performance on his Part, and that the Defendant had not paid the 7 l. It was adjudged, that the Releaſing the Equity of Redemption was Part of the Agreement which the Plaintiff ought to execute, for it was upon that Conſideration, that the Defendant was to pay the Money; therefore the Releaſe was to precede, and till that was executed, the Plaintiff had no Cauſe of Action.

* 1 Sand. 319. Raym. 188. Sid. 423. 1 Vent. 147. Lev. 274.

Now in the principal Caſe, that this was a Deed-Poll they grounded their Opinion upon the Caſe of * Pordage and Cole, which was thus, ſ. There was an Agreement in Writing between the Parties, that the one ſhould pay 500 l. to the other for all his Lands, in Witneſs, &c. This Agreement was mutually executed, &c. and afterwards the Plaintiff brought an Action of Debt for the 500 l. without averring in his Declaration, that he had conveyed the Lands, or tendered a Conveyance thereof: Adjudged that after the Day was paſt, on which by the Agreement the Lands were to be conveyed, the Action was well brought for the Money, becauſe this was a mutual

tual Agreement, upon which either Party hath a mutual Remedy; but 'tis otherwiſe where the Propoſition Pro makes it a Condition precedent; and the Court held that it would have been otherwiſe in the Caſe laſt mentioned, if it had been the Deed of one of the Parties.

So Judgment was given for the Defendant.

Lawrence *verſus* Jacob.

Notice muſt be given to the Drawer of a Bill of Exchange, not being paid by the Endorſer.

UPON a Writ of Error in B. R. upon a Judgment in the Common Pleas, the Caſe was, The Plaintiff, who was the Drawee of a Bill of Exchange, brought an Action againſt the Drawer for Default of Payment by the Endorſer; and after a Verdict and Judgment for the Plaintiff in the Common Pleas, and a Writ of Error in B. R. the Error aſſigned was, that the Plaintiff in his Declaration did not ſet forth, that the Drawer had Notice of the Default of Payment by the Endorſer; and adjudged, that Notice was requiſite; ſo the Judgment was reverſed.

Comyns. 503 contra Hil. 10 G. 2 Skip v. Hook
This Caſe is miſreported for Cheſter Carteret produced the Paper Book
to ſhew the Judgment was affirmed in Eaſter Term 8 Geo. 2 & not the 7th
Comyns. 503.

Colvin *verſus* Fletcher.

Recuſancy pleaded in Diſability.

CASE, &c. againſt the Defendant, who after a general Imparlance, pleaded Recuſancy in Diſability of the Perſon of the Plaintiff; and upon a Demurrer to this Plea it was objected, that it ought not to be allowed after an Imparlance, becauſe Pleas in Diſability are dilatory, and therefore ſhould be pleaded at firſt; and to prove this, the Caſes in the * Margin were cited.

* 1 Inſt. 128. 1 Mod. 14. 1 Lev. 112. 3 Lev. 343. 1 Vent. 76, 135.

To which it was anſwered, that the Reaſon of thoſe Caſes doth not come up to the preſent Caſe, becauſe thoſe were all Pleas in Abatement of the Writ; and in ſuch Caſe, if 'tis abated, the Plaintiff may have a new Writ, but this is in Diſability of having any Writ at all.

2d Objection was, that this Plea is ill, for that it concluded prout patet de recordo, for the Conviction of Recuſancy being at the Seſſions, which is a Record of another Court, it ſhould be pleaded with a Profert hic in Curia ſub pede ſigilli; beſides, this Record being made by the Clerk of the Peace, is † traverſable, for he is no more than a miniſterial Officer, and therefore 'tis not a Record to conclude the Judgment of this Court, ſo ought not to be pleaded here as a Record.

1 Inſt. 128. 3 Lev. 334. Lutw. 1100. Litt. Rep. 201.

† 1 Leon 205. Moor 541.

To which it was anſwered, that if the Record of it ſelf made the Diſability, then it ought to be pleaded (as objected on the other Side) ſub pede ſigilli; but this Record did not make the Diſability, for 'tis no more than an Evidence of it.

'Tis true, the Clerk of the Peace in certifying this Record, is but a miniſterial Officer; but 'tis not a material Objection for the Plaintiff to ſay ſo, becauſe he hath an Opportunity to traverſe it, and to try the Fact; but here the Plaintiff by demurring to this Plea hath owned the Fact, which otherwiſe ought to have been proved by the Record.

For the Plaintiff. But this was denied by the Counſel for the Plaintiff, who argued, that by the Demurrer the Fact was not confeſſed; for the Plaintiff demurred, becauſe the Defendant had not pleaded the Fact, and not to the Fact pleaded.

3. The third Objection was, that the Statute 3 Jac. cap. 4. gives the Seſſions Power to make Proclamation againſt Recuſants to render themſelves, &c. which if they do not, and that the Default is recorded, that ſhall be taken for as ſufficient a Conviction as a Trial by Verdict; now the Defendant hath not pleaded, that any ſuch Default was recorded at the Seſſions; therefore this being in a criminal Caſe, wherein the utmoſt Certainty is required, this Plea cannot be good without purſuing all the Circumſtances required by the Act.

For the Defendant. The Anſwer was, that the Statute requires the Conviction ſhould be certified into the Exchequer with ſuch convenient Certainty, that the Court may award Proceſs thereon; and the Defendant hath pleaded, that it was certified there, which could not have been done unleſs the Default had been recorded at the Seſſions.

(4.) Another Objection was, that this Plea was wrong concluded, for it was, that the Defendant eat inde ſine die, when it ſhould be Ideo loquela præd. remaneat ſine die quouſq;.

To which it was anſwered, that the Precedents are otherwiſe, and thoſe in the Margin were cited to prove it.

Co. Litt. 127. *b.*

2 Lev. 19. 1 Lev. 222. Raſt. Ent. 319, 320, 333, 334. Thompſon Ent. 291.

(5.) The fifth Objection to this Plea was, that the Defendant did not ſet forth, that the Plaintiff had not taken the Oaths ſince the King's Acceſſion to the Crown; for if in Fact he had taken them ſince that Time, then the Statute doth not extend to him, therefore this Matter ought to have been ſpecially ſet forth like a precedent Condition, by him who is to have the Benefit of it, (viz.) That the Plaintiff was a Perſon on whom the Act attaches.

For by the Statute 1 Georgii, 'tis enacted, that all Perſons who ſhall take and ſubſcribe the Oaths in the Manner appointed by that Act, are indemnified from any Penalties and Incapacities, &c. incurred by any former Neglect. 1 Georgii, cap. 1.

The Anſwer was, that by the next Clauſe in that Statute it appears, that this doth not extend to any Perſon, other than ſuch who entitle themſelves to any Offices or Places of Truſt, for thoſe only are indemnified from any Incapacity incurred, and may bring any Action if they have taken the Oaths ſince the King's Acceſſion to the Crown. Sed adjournatur.

The King *verſus* Selfe.

THE Defendant was indicted at the Aſſizes for Forging the Stamps, and appeared there upon his Recognizance to anſwer the ſaid Indictment, and pleaded Not guilty, and upon his Trial he was convicted; but upon a Motion in Arreſt of Judgment it was ſet aſide; afterwards he exhibited a Bill in Chancery againſt the Proſecutor of the Indictment, who pleaded this Conviction of Forgery in Bar to the ſaid Bill; and now the Plaintiff in Chancery moved the Court of B. R. that the Record might be made up with the Arreſt of the Judgment, for that by a Miſtake of the Clerk of the Aſſize that was not recorded, nor did there any Notes thereof appear in his Books, but only that he was bound over by Recognizance to appear at the Aſſizes, and that he did accordingly appear and ſaved his Recognizance; all which Matter being evident to the Court by the Records of the Aſſizes; but yet they would make no Rule for the Record to be made up with the Arreſt of Judgment, becauſe a Precedent of this Nature might be of dangerous Conſequence, and therefore deſired that the Cauſe might be put into the Paper, and ſpoke to again, that it might be judicially determined. A Rule was denied to make up a Record with the Arreſt of Judgment, &c.

The King *verſus* Okey.

UPON a Motion to file an Information againſt the Defendant (who was a Juſtice of the Peace) for ſending the Proſecutor to the Houſe of Correction without a ſufficient Cauſe; the Rule was, that he ſhould ſhew Cauſe on ſuch a Day, why the Information ſhould not be filed; and now he ſhewed this for Cauſe, (viz.) That the Proſecutor was a Servant to L. R. who complained to the Defendant, that his ſaid Information againſt a Juſtice of Peace for ſending one to the Houſe of Correction without Cauſe.

said Servant was lawcy, and gave his (the Master's) Horses too much Corn.

Curia. The Court held this was not a sufficient Cause to send a Man to the House of Correction, so Leave was given by the Court to file an Information against the Justice of the Peace.

DE

Term. Sanct. Trin.

Anno 7 Georgii, 1722.

Mayhoe *versus* Archer.

A Farmer no Trader within the Statute of Bankrupts.

IN a special Verdict, the Case was thus, (viz.) The Jury found that Richard Baxter rented a Farm, for which he paid 300 l. per Annum, and that he planted Potatoes on Part of the Lands which he farmed, and that he bought great Quantities of Potatoes to plant there, and that for several Years past he dealt with several Persons in Potatoes at several Times and Places, and had employed Ware-houses, where he put in Potatoes, and had served several Markets therewith, and had sold great Quantities thereof for Profit, and for his Living, &c.

Upon this special Verdict there were two Points raised.

(1.) If the Jury have found enough to make Baxter a Trader within any of the Statutes made against Bankrupts.

(2.) Whether a Farmer who sells Potatoes, tho' he buys several other great Quantities thereof, and gets his Living thereby, is within any of the said Acts.

As to the first Point it was argued, that the Jury had found enough to make Baxter a Trader within the Statutes of Bankrupcy; for tho' Farmers or Innkeepers quatenus such, are not within those Statutes; yet as Traders they are, and here tho' the Jury have found that Baxter was a Farmer, yet they likewise find that he was a Trader in Potatoes which he bought and sold; and there is a Case adjudged in this very Point, (viz.) * If a Farmer buys and sells Butter and Cheese, he shall be accounted a Trader; and that such a Trader failing to pay his Debts, is a Bankrupt, and by this Means he is a Criminal; and therefore the Law shall be construed against him very strictly in Favour of his Creditors. * Cro. Car. 549.

If a Man hath several Trades, whereof one is within, and another not within the Statutes; yet he shall be accounted a Trader so as to make him a Bankrupt, and so shall a Lawyer dealing in Coals.

And the dealing more in one Commodity than in another, doth not alter the Case; for no Man (except the Trader himself) can tell in what Commodity he mostly deals; therefore that Trading which is the most visible Means of his Livelihood is to be regarded. March 35. 1 Vent. 166. 129. 1 Lev. 17. 1 Sid. 411.

Now in the principal Case 'tis apparent, that by dealing in Potatoes Baxter got Credit, and probably of several Persons who did not know that he rented a Farm; but if he did not, yet there are sufficient Words in this Verdict to make him a Trader, it being found that he sold several great Quantities of Potatoes, *&c.*

(2d Point.) There are many great Hop Merchants in England, who have Hop-Yards of their own; but yet shall be accounted Traders, so as to subject them to the Statutes of Bankrupcy; and this Trade of dealing in Potatoes, tho' he was likewise a Farmer, may be compared to that Case where the Plaintiff libelled for Tithes of Faggot-Wood; and the Defendant suggested for a Prohibition, that no Tithes ought to be paid for Oak-Faggots; the Plaintiff in his Prayer for a Consultation may shew, that the Defendant had so sorted the Faggots, that it was impossible for him to take the Tithes of the one, without the other. Yel. 119. Poph. 38. 3 Cro. 347, 366. 2 Lev. 80. 1 Sid. 38. T. Jones 438.

It was argued on the other Side, that this Case as found by this Verdict, is not within the Intention of any of the Statutes of Bankruptcy, because 'tis found that Baxter got his Livelihood by buying and selling of Potatoes; for if he bought some, and had some of the Growth of the Lands which he rented, he is not a Trader within any Econtra.

of

of those Statutes; for a Farmer who bought and sold Cattle was adjudged no Trader, so as to make him a Bankrupt; nor an Innkeeper who lays in Malt and Corn, neither shall a Farmer who deals in Turnips be accounted a Trader.

Curia. The Court being divided, no Judgment was given, but two of the Judges seemed to be of Opinion, that where a Man bought great Quantities of Wool or Hops, tho' he hath a Farm, and Sheep of his own, and several Hop-Gardens, he shall be accounted a Trader in those Commodities, and so shall an Innkeeper, if he turn Corn-Chandler.

'Tis true, the Jury have not found that Baxter got the chiefest Part of his Livelihood by buying and selling Potatoes, but 'tis not the Quantity which is material, if 'tis in Proportion to other Goods which he buys and sells; for if a Man hath an Orchard, and buys several Quantities of Fruit of other People, tho' not so many as he hath in his own Orchard; yet this shall make him a Trader, and consequently subject him to the Statutes of Bankrupcy.

The two other Judges were of a contrary Opinion, (viz.) that here was not enough found by this Verdict to make Baxter a Bankrupt; for a Farmer is no Trader within any of the Acts before-mentioned, quatenus a Farmer; and tho' he uses another Trade, yet if that is not the principal Means of his Livelihood, he is not a Trader within those Statutes; 'tis true, if buying and selling in any Trade is the chiefest Means of his Livelihood, then he is a Trader within the Acts of Bankruptcy; but that is Matter to be given in Evidence, and found by the Jury which was not done in this Case.

Therefore they held, that this was an insufficient Verdict, because the Jury did not find that Baxter, by buying and selling Potatoes, got the chiefest Part of his Livelihood, or that it did exceed his farming Trade, for all that the Statute requires is, that Trading should be the chief Matter to make him a Bankrupt.

A special Verdict amended. Afterwards in Trinity-Term the Counsel for the Plaintiff finding the Judges differed in Opinion, they moved for a Venire facias de novo, or that the Court would give Leave to mend this special Verdict upon the Affidavit of one of the Witnesses at the Trial, that Baxter bought Potatoes several Years, to the Value of Five hundred Pounds per annum; and thereupon a Rule was made for the other Side to

ſhew Cauſe why the Verdict ſhould not be amended, and the Cauſe which they ſhewed was, that tho' this Witneſs had ſworn the ſame Thing at the Trial; yet it was without Precedent to have a Verdict (which is a Record) to be amended by ſuch an Affidavit; for tho' it was the ſame which was given in Evidence before; yet the Jury did not believe it, or probably there might be other Evidence at the Trial to diſprove it.

But the Court was of Opinion, that a ſpecial Verdict might be mended by Notes taken by the Clerk at the Trial, or on Proof of the Certainty of what was then given in Evidence, and the ſame was ruled accordingly upon Payment of Coſts.

Nota; This Caſe was between two Creditors of the Bankrupt, for the Statute 21 Jac. cap. 19. gives no Precedency between the Creditors of a Bankrupt, though the Debts are due to ſome upon Recogniſances or Judgments, or other Specialties, and to others upon Simple Contracts; for 'tis enacted by that Statute, that in the Diſtribution of the Bankrupts Eſtate, no more Reſpect ſhall be had to the Debts upon Judgments and Specialties, &c. than to other Debts.

The King *verſus Inhabitants of* St. Peter's *Pariſh in* Oxford.

A Servant living with a Viſitor gains a Settlement.

THE Caſe was thus, ſt. Mary Norris was hired for a Year in Chriſt-Church in Oxford, and afterwards lived with her Miſtreſs three Months of that Year, in the Pariſh of Fawley in Berks, her Miſtreſs being a Viſitor there, and ſhe ſerved the remaining Part of that Year in Chriſt-Church in Oxford, that being an extraparochial Place.

Afterwards ſhe being poor, and likely to become chargeable, went into the Pariſh of St. Peters in Oxford, and from thence ſhe was removed by the Order of two Juſtices, to the Pariſh of Fawley, as having gained a lawful Settlement there (as they apprehended) by the three Months Service; and upon an Appeal, that Order was quaſhed, the Seſſions being of Opinion, that ſhe gained a Settlement in Chriſt-Church, that being the Place where the Service determined.

Both which Orders being removed into B. R. by Certiorari, it was inſiſted, that the Seſſions Order might be quaſhed; for tho' Chriſt-Church was the Place where the Service determined

termined, and by Conſequence ſhe gained a Settlement there after the firſt Settlement gained at Fawley; yet ſhe could not be ſent thither, becauſe Chriſt-Church being an extraparochial Place is not within any of the Statutes relating to the Settlement of the Poor; for thoſe Statutes require, that the Hiring ſhould be in Town or Pariſh, where there are proper Officers to take Care, that the Hiring ſhould not be fraudulent to charge the Pariſh; and that the Maſter himſelf might be removed, if he had no Settlement there, and was likely to be chargeable.

If a Servant is hired in Ireland, and ſerves Part of his Time in a Pariſh of England, he gains no Settlement in that Pariſh; therefore Chriſt-Church having no Pariſh-Officers, and being neither a Town or Pariſh, ſhe cannot be ſent thither, for which Reaſon ſhe muſt remain at Fawley.

Econtra. On the other Side it was argued, that this Woman had gained a Settlement in Chriſt-Church, and could have none at Fawley; for tho' a Servant who lives with a Lodger gains a Settlement as his Maſter doth; yet a Servant who lives with a Viſitor doth not; for if he ſhould, then any Man who is likely to be chargeable to a Pariſh, may be hired by one who intends to make a Viſit there, and ſhall gain a Settlement where ſuch Viſitor continues for ſome Time; for as ſuch he cannot be removed, but as he ſerves a Lodger, he may.

Beſides, if the Seſſions Order ſhould be affirmed, that would be concluſive to St. Peters, it being an Order affirmed upon an Appeal; to which it was anſwered, that it would be concluſive only as to the contending Pariſhes, but not to a third Pariſh.

Curia. The Court held, that when a Servant continues in the Service of a Viſitor, he gains a Settlement; for he cannot be removed, unleſs the Pariſh ſhew that he was brought or came thither on Purpoſe that he might have a Settlement; for the Statute doth indefinitely, and without any Exception appoint, that where the Service is for forty Days, it ſhall gain a Settlement; therefore it ſhall have a favourable Conſtruction in Behalf of the Poor.

So if a Woman is delivered of a Baſtard-Child in ſuch a Pariſh, the Birth gains a Settlement, but not if ſhe is ſent thither on Purpoſe for that End, or if her Settlement was conteſted before ſhe was delivered.

Tho' the Mistress in this Case was a Visitor, and no Lodger, that doth not alter the Case, because the Service was intirely independent of her; and as to the Objection that the Statute requires, that the Hiring should be in a Town or Parish, and that this Servant was hired neither in the one or the other, but in an extraparochial Place; this is of no Weight, for a Servant may be said to be hired in every Parish where he serves, as well as a Man who steals Cattle in one County, and drives them into another County, may be said to steal them in either County.

Winnington *versus* Briscoe.

THE Plaintiff bought 1000 l. South-Sea Stock of the Defendant, on the 10th Day of August, 1720. for which he (the Plaintiff) agreed to pay 11250 l. and had paid 3000 l. Part of the Money; and the Defendant promised to give him (the Plaintiff) Receipts for the said 1000 l. Stock, as soon as the Books of the Company were open; but before they were opened an Act of Parliament was made, prohibiting any more Receipts to be given out, &c. whereupon the Plaintiff brought his Action against the Defendant for the 3000 l. he had paid to the Defendant as so much Money he had received to his (the Plaintiff's) Use: The Question was, Whether the Failure to deliver the said Receipts should subject the Defendant to this Action, or whether the Defendant himself might not have an Action against the now Plaintiff for the remaining 8250 l.

An Agreement impossible to be performed shall not prejudice any Person.

The Court was of Opinion, that the Receipts being no Part of the Consideration, but only an Evidence of the Agreement between the Parties, which Agreement being impossible to be performed by an Act of Parliament intervening, shall prejudice neither Party; and the Subscription it self, which the Defendant is still ready to give, is but an Evidence likewise of the Agreement; but the Credit he hath is the Substance.

Curia.

Mason *versus* Bushel.

THE Plaintiff brought an Action against A. B. late of H. &c. Yeoman, the Defendant pleaded in Abatement, that he was a Horner; and upon Demurrer to this Plea it was argued, that Yeoman was a good Addition within the * Statute

Where the Word *Yeoman* is a good Addition to the Name. 2 Inst. 668.

* 1 H. 5. cap. 5.

tute 1 H. 5. by which 'tis enacted, that in original Writs where Exigent ſhall be awarded, the Addition of the Defendant's Condition and Dwelling ſhall be inſerted; now here there was the Addition of Yeoman, which the Defendant muſt be if he is not a Gentleman, and a Horner may be a Yeoman, (i.e.) an ordinary or common Perſon; and if ſo, then the Plaintiff hath Election to name the Defendant, either by his Degree or Condition, or by his Myſtery or Trade; and this being a Plea in Abatement, the Defendant ought to have given the Plaintiff a better Writ, and that directly in the ſame Species of Addition, and oppoſite to the Addition of Yeoman, which he ſhould have pleaded.

The Court was of Opinion, that the Defendant ought to have given the Plaintiff a better Writ in the ſame Species of Addition, otherwiſe he would take away his (the Plaintiff's) Election of Addition of his Degree or Myſtery, for an Horner and a Yeoman are not inconſiſtent; therefore the Plea was adjudged ill, and the Defendant ruled to anſwer over.

Brown *verſus* Reyland. *Item poſt 351*

Caſe, &c. for keeping the Plaintiff out of the Veſtry-room, ſo that he could not be preſent to vote at an Election for Pariſh-Officers.

AN Action on the Caſe was brought by the Plaintiff as a Pariſhioner of the Pariſh of C. againſt the Defendant, being the Clerk of the Veſtry there, for ſhutting the Veſtry-Door, and keeping the Plaintiff out of the Room, ſo that he could not come in to vote, &c. And upon a Demurrer to the Declaration it was inſiſted for the Defendant, that an Action would not lie in this Caſe, for if it ſhould, then every Pariſhioner who was kept out might have the like Action; therefore to avoid * Multiplicity of Suits, this will not lie againſt the Defendant, unleſs he had ſet forth ſome particular Damage done to him.

* 5 Rep. 72. Williams's *Caſe*. 1 Salk. 12, 15.

Curia; The Plaintiff, as a Pariſhioner, hath a Right to be preſent and vote in the Veſtry at the Election of Pariſh-Officers; and as to all Rates with which the Pariſhioners are charged; ſo that this Action is his proper Remedy for the Injury done by the Defendant, by hindering to come into the Veſtry-room; for if it would not lie he hath no other Remedy.

Cro. Eliz. 664.

Sheers *verſus* Lammas.

In an Avowry the particular Day of Entry was not ſet forth, yet good.

IN Replevin, &c. the Defendant avowed, ſetting forth, that T. S. being ſeiſed in Fee of the Place where, &c. made a Leaſe thereof to the Plaintiff, habendum for 19 Years from

Michaelmas, &c. rendring Rent, &c. and afterwards deviſed the Lands to the Defendant and his Heirs, and died; then he ſets forth, that the Plaintiff in Replevin Virtute dimiſſionis prædict. intravit (but did not ſay on what Day) & fuit inde poſſeſſionatus, and that ſo much Rent was due on ſuch a Day, and being in arrear, he diſtrained, &c. and ſo juſtified the Taking; and upon a Demurrer to this Avowry it was objected, that the Entry was laid too general, for it ought to be Virtute cujus quidem dimiſſionis (the Plaintiff in Replevin) intravit on ſuch a Day, & fuit inde poſſeſſionatus; becauſe unleſs the particular Day of his Entry is ſet forth, he might enter before the Leaſe commenced, and then he could be no Termor, but a Diſſeiſor; and in ſuch Caſe the Avowry ought to have been for a Treſpaſs, and not for Rent, for wherever an Action of Debt is brought for Rent reſerved on a Leaſe for Years, or where a Juſtification is made for Rent arrear on a Leaſe, it muſt be ſpecially ſhewed, that the Perſon, from whom the Rent is due, entered on the Day the Leaſe commenced.

But on the other Side it was inſiſted, that the Allegation in this Avowry is ſufficient to ſhew, that the Entry was before the Diſtreſs taken.

'Tis true, there is no particular Day ſet forth in this Avowry, when the Plaintiff entered; but yet theſe Words, Virtute cujus quidem dimiſſionis intravit, & fuit inde poſſionatus, muſt be intended of a legal Entry by Virtue of the Demiſe; but admitting that he had actually entered before the Commencement of the Term, yet theſe Words, Et fuit inde poſſeſſionatus, ſhall be taken to continue the Poſſeſſion afterwards. Curia.

My Lord Coke, in his Comment on Littleton, hath a parallel Caſe, (viz.) If Tenant for Life in Remainder diſſeiſe the Tenant in Poſſeſſion, he hath gained a Fee by ſuch Diſſeiſin; but by the Death of the Diſſeiſee that wrongful Fee is turned into a rightful Eſtate for Life by Operation of Law.

So in the principal Caſe, the Continuance of the Poſſeſſion by the Plaintiff ſhall be intended by Virtue of the Leaſe by which he might defend himſelf in an Action of Treſpaſs or Ejectment brought by the Leſſor; but the Court being not clear in Opinion, no Judgment was given. *See* Hob. 72. Pope *verſus* Skinner. Hob. 128. Niſhart *ver.* Caſon. 2 Cro. 662. Rutter *ver.* 3 Mod. 198.

Mills. 2 Cro. 684. Brookbank *verſus* Taylor.

But the following being a parallel Caſe, was adjudged in Michaelmas-Term following.

Macdonell

Macdonell *verſus* Weldon.

Where a Leaſe is made to commence from a Day to come, that Day is excluſive.

ſſ. ERROR of a Judgment in Replevin brought in the Common Pleas, where the Defendant avowed, for that T. S. being ſeiſed of the Place where, &c. in Fee, demiſed the ſame to the Plaintiff for a certain Term of Years, to commence from the Feaſt of St. John Baptiſt, &c. rendring Rent, and that the Reverſion in Fee came to the Avowant; and that the Plaintiff Virtute dimiſſionis prædict. intravit & fuit inde poſſeſſionatus, on and from the ſaid Feaſt, *&c.* and the Rent being in arrear at ſuch a Time, he (the Defendant) diſtrained, and ſo juſtified the Taking; and upon a Demurrer to this Avowry it was argued, that where a Leaſe is made to commence from a Day to come, the Day it ſelf is always excluſive; and if the Leſſee enters before the Commencement of the Leaſe, he is a Diſſeiſor, and no Leſſee.

Neither can his continuing in Poſſeſſion after the Commencement of the Leaſe, tranſpoſe it to be an Eſtate for Years and purge the Diſſeiſin, becauſe the firſt Entry was by Wrong; like an Ejectment, where if it appear that the Entry was before the Commencement of the Leaſe, the Defendant could never be poſſeſſed by Virtue of that Leaſe; and in this Caſe the Avowant ſhews, that the Leſſee is a Diſſeiſor, and the Contract between him and the Leſſor is not ſufficient to maintain an Action at Law.

Dyer 89, 109. 2 Roll. Abr. 420. 3 Cro. 766. Sid. 8.

Econtra.

It was admitted, that the Caſes cited in the Margin are Law; but there is a Difference where the Leſſee enters with the Conſent of the Leſſor before the Commencement of the Leaſe, and where he enters without ſuch Conſent; for in the firſt Caſe, the Leſſee is a Diſſeiſor by the Wrong done to the Leſſor; but where he (the Leſſee) enters with the Conſent of the Leſſor, there no Wrong is done.

Caſe

'Tis true, he cannot demand any Rent due before the Commencement of the Term; but yet by his continuing in Poſſeſſion, and by the Conſent of the Leſſor, who hath the Right, he (the Leſſor) may have an Action for the Rent arrear.

Curia.

The Court held there was a Difference between an Ejectment wherein the Plaintiff is to recover his Term, and an Avowry for Rent; for in the one Caſe the Plaintiff muſt truly make out his Title, but ſo much Strictneſs is not required in the other.

Beſides, no Act of the Leſſee ſhall hurt or impeach the Contract between him and the Leſſor, nor ſhall his (the Leſſee's)

Entry before the Commencement of the Lease, discharge the Rent; but he shall still be liable to an Action of Debt, for the Rent Arrear. Cro. El. 905. 1 Roll. Abr. 605.

'Tis true, every Disseisor is a Trespasser, but not e converso without an Ouster by taking the Profits, or by an actual Expulsion.

And in this Case, the Lessee did not only enter before the Day, but continued in Possession after the Day the Lease commenced; and that by the Consent of the Lessor himself; so it shall be in his Election to take the Lessee for a Disseisor by his tortious Entry; but by no Means to be a Disseisor when he continued in Possession, by the Consent of the Lessor; so this Avowry was held good, and the Judgment was affirmed by the whole Court. 2 Cro. 684. Cro. Car. 302, 434. 1 Lev. 270. Salk. 245.

The King *versus The Mayor and Burgesses of* Malmsbury.

Information against a Burgess for not taking the Oaths at the Time of his Election, not granted.

UPON a Motion for Leave to file an Information against the Defendants, upon an Affidavit of the Town-Clerk of Malmsbury, for that one Gawen Hart of the said Borough of Malmsbury, was admitted to be a Capital Burgess thereof in the Year 1714. and had not taken the Oaths of Abjuration and Supremacy when he was admitted; a Rule was made for the Defendants to shew Cause why an Information in Nature of a Quo Warranto should not be filed; and now the Defendants produced several Affidavits, by which it appeared, that the said Hart did take all the Oaths which were tendered to him at that Time, when he was admitted to be a Capital Burgess; and also that he had taken the Oaths of Abjuration and Supremacy in some short Time afterwards at a Quarter-Sessions held in Wiltshire, and he himself made Affidavit, that he believed he had taken all the Oaths requisite for him to take at the Time of the Election.

If so, then it plainly appears, that he had not neglected to take the Oaths out of any Disaffection to the Government, but meerly because they were not tendered to him by the Town-Clerk at the Time when he was chosen Capital Burgess, he (the Town-Clerk) being the proper Person to tender the same, and who shall be intended to know the Penalty in not taking them.

And tho' in Rigour of Law his not taking the Oaths made his Election void; yet since it was meerly thro' the Neglect of the Town-Clerk, and who had now acquiesced without any manner

manner of Prosecution for above 8 Years; therefore this Burgess ought not to be damnified, especially since this Prosecution seems to be carried on at the Instance of a great Person who offered Hart's Wife 1000 Guineas the Night before the Day of the last Election of Members to serve in Parliament, to persuade her Husband to give his Vote and Interest to a Person who then stood Candidate to be chosen a Representative for the said Borough, which she refused, as appears by her own Affidavit; and therefore this Town-Clerk was put on to prosecute the Husband.

Econtra. The Question is not concerning the Misbehaviour of the Town-Clerk, but whether this Hart was duly chosen a Capital Burgess; and it seems very plain, that he was not, because the Statute requires he should take the said Oaths, otherwise his Election is void; and if so, it cannot now be made good; neither will Length of Time, or any pretended Ignorance of the Statute enable a Person to officiate contrary to the express Words of the Act it self.

For if he is an Usurper, the long Continuance in his Office will not shelter him from an Information, because 'tis positively required by the Statute, that he shall take the Oaths before he is admitted to the Office.

Curia. If he did not take the Oaths at the Time of his Election to be a Capital Burgess, he is not qualified to be a Burgess, and the Length of Time, wherein he continued to be so, will not obstruct the Filing an Information against him, but then after so long a Time there ought to be a clear Proof of his willful Refusal, or voluntary Neglect to take the Oaths; but certainly an Information ought not to be granted upon the Oath of the Town-Clerk himself, because it was his Fault, that this Hart did not take the Oaths; and it was likewise his Duty to discover the not Taking them, which he had not done for so many Years together; therefore that Length of Time shall gain a Presumption in his Favour, especially when by other Affidavits 'tis proved, that he took all the Oaths he believed to be requisite for him to take at the Time of his Election.

So the Information was not granted.

Anonimus.

Where Money is to be paid at several Times, an Action may be brought for the whole upon Failure of Payment upon one of the Times.

THE Case was thus, ff. A Man by Marriage Articles was to pay 50 l. at 5 l. per ann. till the whole 50 l. should be paid, and in Failure of Payment of any 5 l. then he was to pay the Whole.

2 The

The Question was, Whether upon Failure of Payment of one 5 l. an Action could be maintained for what was then due.

It was argued, that it could not till all the Days of Payment were past.

Besides, the Statute for amending the Law gives the Judges Power, upon Payment of Principal, Interest and Costs, to discharge a Man after Judgment obtained against him for a Penalty; and this shall be deemed an equitable Penalty. 1 Inst. 292. 3 Rep. 22. 5 Rep. 52.

The Power given to the Court by the Statute is to stay all Proceedings on Payment of all that is due; and in the principal Case all the 50 l. is due, and no Part of it is a Penalty, but only the Defendant by the Condition of these Articles had Time for the Payment of the Money by Parcels as therein directed, the Benefit of which Condition is now lost by his Breach thereof; so the Plaintiff had Judgment. Curia. 2 Cro. 504. 1 Roll. Abr. 29. Cro. El. 113. Beckwith *ver.* Potts.

DE

Term. Sanct. Mich.

Anno 8 Georgii, 1722.

Coleborne *versus* Stockdale.

IN an Action of Debt on a Bond, &c. the Defendant pleaded, that the said Bond was given for Money won at Play; the Plaintiff replyed, that it was not given for Money won at Play; and upon a Demurrer to this Replication, it was insisted for the Defendant, that it was ill, because the Plaintiff did not set forth, that the Money or any Part thereof was not won at Play; for by the Statute 9 Annæ, Debt on a Bond for Money won at Play. 9 Annæ cap. 14.

'tis enacted, That all Securities, where the Whole or any Part of the Consideration is for Money won at Play, shall be void; so that 'tis not sufficient for the Plaintiff to alledge, that the Money for which the Bond was given, was not won at Play, but he must likewise add, nor any Part thereof; for if any Part is for gaming Money, the entire Specialty is avoided by the Statute.

Econtra. Where the Plaintiff hath any manner of Right, he may alledge it to support his Action, and where the Defendant pleads but one Fact, there can be but one Reply.

Curia. The Court was of Opinion, that the Replication was too large and incertain; therefore gave Judgment for the Defendant.

The King *versus* Gibbs.

Indictment for selling Beer without paying the Duty, not good.

THE Defendant was indicted for selling Beer without paying the Duty, and upon Not guilty pleaded, the Cause was tried, and he was found guilty.

And it was now moved in Arrest of Judgment, that this Indictment was insufficient, because it set forth, that the Defendant sold Beer without paying the Duty; but did not shew to whom, or at what Time it was to be paid, nor what Quantity of Beer he sold, and consequently a Conviction upon such an incertain Indictment cannot be pleaded to any other for the same Offence; neither can the Defendant make any tolerable Defence to such an incertain Charge.

2 Lev. 39. 4 Mod. 100. Besides, in criminal Cases, the utmost Certainty is required; therefore the Quantity of the Offence should have been set forth in this Indictment, so as a Conviction thereon might have been a Bar to all other Actions and Prosecutions for the same Offence; and for this Reason the Judgment was arrested.

The King *versus* Sparrow.

Information for prophane Cursing and Swearing, and a Conviction thereon quashed. *v. post.* 366.

INformation upon the Statute 6 & 7 Will. cap. 11. made against prophane Cursing and Swearing, by which the Offender forfeits 2 s. for every Oath (other than a Servant, Labourer, common Soldier or Sailor); upon Not guilty pleaded, their was a Verdict for the Prosecutor; and it was moved in Arrest of Judgment, that this Information was too wide and incertain, because it did not set forth, that the Defendant was not a Servant, Labourer, common Soldier or Sailor; for this being

being in a criminal Case, it shall be intended, that he was one of those Persons, if it doth not appear that he was not; therefore that Matter ought to have been specially set forth; like the Case where the Defendant pleads a Pardon, he must shew, that he is a Person not within either, or any of the Exceptions.

Besides, the Oaths ought to have been specified in the Information, that the Court may judge of the Nature of them; for otherwise the Informer makes himself a Judge of the Fact, and that in his own Cause, which shall never be allowed.

It was argued on the other Side, that this Information was good, for if the Defendant was either a Servant, Labourer, common Sailor or Soldier, he ought to have pleaded it, or to have given it in Evidence at the Trial; but for the Reasons above-mentioned the Conviction was quashed. Econtra.

Burr *versus* Davall.

THE Case was, *ff.* Sir Thomas Davall had two Sons, and being taken ill on the 15th Day of April, 1719, he made his Will about four Days afterwards, and devised his Estate in Essex, being about 1600 l. per Annum, to his eldest Son, and the Heirs of his Body, and his Middlesex Estate being about 1700 l. per Annum, to his youngest Son, and to the Heirs of his Body; and that if either of his said Sons died without Issue, then the Estate of him so dying should remain and go to the Survivor; and if both his said Sons should die * with Issue, then he devised the whole Estate to Daniel Burr (the Lessor of the Plaintiff) and his Heirs.

Non compos, &c. what Proof shall not be allowed to make a Man *Non compos.*

* Instead of without Issue.

Both the Sons died without Issue, and the Lady Davall, the Widow of the Testator, and who was his Heir at Law, endeavoured to set aside this Will.

And the Question was, If Sir Thomas, the Testator, was Compos mentis at the Time he made this Will; and to shew that he was not, it was argued, that a Father in his Senses would not have left his youngest Son a greater Estate than he left to his eldest, who had only his Essex Estate, and by Articles in Marriage he was bound to leave his younger Children 10000 l. out of that Estate, and his Lady 600 l. per Annum Jointure out of that very Estate.

Besides, If the Testator had been in his Senses, the Words in his Will would not have carried an Estate to the Lessor of the Plaintiff, for the Devise was to his Sons, &c. and that if both died with Issue, instead of without Issue, then

to Daniel Burr, ſo that this being a Condition precedent, the Plaintiff can have no Eſtate by this Will.

Neither ſhall the Probate thereof by the Executor add any Strength to it in this Court, ſince the Defendant was next Heir at Law to the Teſtator at that very Time; ſo it was held in the Caſe of Sir George Markham and the Lord Mountague, where the Will was proved by the Heir at Law; yet by the Judgment of this Court confirmed on a Writ of Error in the Houſe of Lords, it was avoided as to the real Eſtate.

Econtra. 'Tis no Objection to ſay, that the Teſtator was not compos mentis, becauſe he did not diſpoſe his Eſtate with that Prudence another Man might have done, for he himſelf is the proper Judge why he deviſed it in that Manner; and 'tis very probable, that in his laſt Sickneſs he did not remember out of which Part of his Eſtate his Wife was to have her Jointure; ſo that if this Will ſhould be ſet aſide for the Reaſon ſuggeſted by the Defendant's Counſel, then there would be but little Room left for a Man in his laſt Sickneſs to make any Settlement or Proviſion for his Family.

At this Trial the Counſel for the Plaintiff objected againſt a Witneſs produced by the Defendant to prove, that the Teſtator was not Compos mentis, (viz.) That he was to get by the Succeſs of this Cauſe.

Witneſs, an Objection to him. To which it was anſwered, that there were but two Ways of excepting againſt a Witneſs, (viz.) Either as to his Oath, or by proving that he was a diſabled Perſon, and this muſt be done on the other Side.

Words in a Will muſt be taken in that Senſe which is conſiſtent with Reaſon. Then if there ſhould be any Doubt, Whether the Words in the Will were Dying with Iſſue, or without Iſſue, it ought to be taken in that Senſe which makes the Will conſiſtent with Reaſon and good Senſe: The Jury found for the Plaintiff.

The King *verſus* Diſney.

A Servant ſhall be ſettled where he ſerves, and not where he was hired. THIS Caſe was moved in this Term, but ruled in the next:

ſſ. One Diſney was hired in the Pariſh of St. Peter's in Oxford, by Stonell his Maſter, who kept a Stable of Horſes at Chipping-Wickham, for the London Road, and there he ſerved a whole Year, and not in the Pariſh of St. Peter's, where he was hired; afterwards, being likely to be chargeable, he was removed by an Order of two Juſtices, to the Pariſh of

St. Peter's, where he was hired, and where his Master lived, which Order was confirmed upon an Appeal.

And now upon a Certiorari to remove the said Orders, it was moved, that they may be quashed, because it appears by the original Order, that this Man was settled at Chipping-Wickham, for there he served a whole Year; and tho' the Hiring was in St. Peter's Parish, yet 'tis not that, but the Service which makes the Settlement.

It was insisted on the other Side, that 'tis more reasonable the Settlement of the Servant should be where his Master lives, than elsewhere, because the Master might settle himself in any Parish where he pleased, tho' he did not live there himself. Econtra. otherwise his Servant

The Court was of Opinion, that this Man was settled at Chipping-Wickham, for 'tis the Service, and not the Hiring, which makes the Settlement; and this is a common Case, for if a Man hath Lands in two Parishes, and keeps House, and lives in one Parish, and hath a Stock of Cattle in another Parish, and Servants there to look after them, they shall be settled in the Parish where they serve, and not in the Parish where they were hired, and where their Master lives: So the Sessions Order was quashed. Curia.

The King *versus* Fairclough *and others.*

THE Case was, ff. The Rector of the Parish of C. by a verbal Agreement let his Tithes to Fairclough and others, paying to him 2 s. 6 d. per Acre for one Year, and Fairclough, and the other Farmers of the said Tithes, let the same to the respective Tenants of the Lands, paying to them 3 s. per Acre for that Year, excepting one Tenant, for which they received Tithes in Kind, and paid to the Rector 2 s. and 6 d. per Acre. The Rector made a verbal Lease of his Tithes for a Year, the Lessee lets the Tithes to the respective Land-holders for 6 d. *per* Acre more than he was to pay to the Rector; adjudged, that the Lessee is the Occupier of the Tithes, and to be charged to the Poor-Rate.

Afterwards they, the said Fairclough and the other Farmers were charged by the Church-wardens and Overseers of the Poor of the said Parish of C. by a Rate, towards the maintaining the Poor of the said Parish, upon the Statute 43 Eliz. cap. 2. as Occupiers of the Tithes; and upon an Appeal to the Sessions they were discharged as to all, excepting only 7 s. which they were ordered to pay for the Tithes of that Tenant, which they received in Kind.

And all this being removed into B. R. by Certiorari; the Question was, who shall be accounted the Occupiers of those Tithes, either the Farmers who paid the Rent to the Rector,

or

or the Tenants of the Lands who paid their Rent for the Tithes to the Farmers.

It was argued, that the Farmers were not to be charged as Occupiers, they having let the Tithes to the Tenants of the Lands; and that 'tis a settled Point, that the Rector is not an Occupier when he lets his Tithes to farm; and the Reason is the same, that the Farmers shall not be Occupiers when they let the Tithes to the Land-holders, therefore they, and not the Farmers, may properly be accounted the Occupiers; for if the Farmers had made an Under-lease to T. P. who had by Virtue thereof let the Tithes to the Land-holders, they had been the Occupiers of the Tithes.

'Tis true, in Strictness the Land-holders have not the Tithes till they are severed from the nine Parts, but they have the Substance thereof, (viz.) the Profits, and 'tis for that Reason they shall be charged as Occupiers, for the Farmers have only a dry Rent out of the Tithes, which may be double that Value to the Land-holders, and they (the Farmers) never bought the Tithes, but pay so much for them to the Rector for a Year, and the Land-holders pay so much to them (the Farmers) therefore they may be charged at any Time of the Year by the Parish-Officers, for the Right of the Tithes is in them all the whole Year, and not in the Farmers.

Econtra. On the other Side it was argued, that the Farmers shall be accounted the Occupers of those Tithes, and that in Regard of the 3 s. p Acre paid to them by the Land-holders; and that 'tis impossible for the Parish-Officers to charge any other than the Farmers, as Occupiers of the Tithes, because the Land-holders only purchase them at Harvest, and therefore are no more Occupiers than Strangers, who may buy them at any Time, if the Land-holders do not agree to purchase them, so that the Farmers having got the Value of the Tithes, shall be accounted Occupiers thereof; and the Land-holders cannot be charged with Respect to the Value of the Tithes, because the Farmers have the Value, therefore they (the Land-holders) cannot be Occupiers when the Farmers receive the Profits.

And the Court was of that Opinion, (viz.) That the Farmers shall be accounted the Occupiers of those Tithes; 'tis true, it might be otherwise if an Under-lease had been made thereof, but this is a particular Case; and it appears by the Rate, that the Farmers have 6 d. p Acre profit; and if the Rate is assessed on the Profits of the Tithes, it ought to be assessed on them, because it doth not appear to the Court, that the Land-holders had any Profit, for they may have a hard Bargain.

Therefore they shall rather be accounted Buyers of those
2 Cro. 137. Tithes, than Occupiers; for where an Agreement is made for

Tithes, they shall pass by Way of Bargain, otherwise they cannot pass at all, because they lie in Grant; and therefore cannot otherwise pass than by Deed, for a verbal Agreement for them is good only for a Year.

The Money which the Farmers receive of the Land-holders for those Tithes shall be accounted a Modus; and wherever there is a Modus, he who receives it shall be taken to be the Occupier of the Tithes.

So where a Man hath a Wood or standing Corn, and sells the same standing, the Seller shall pay the Taxes for that Year.

In this Case the Rector who serves the Cure for 2 s. 6 d. per Acre shall not contribute to the Poor's Tax; but the Farmers who have such a Benefit of six Pence per Acre without any manner of Consideration for it, by raising so much on the Land-holders; therefore the Sessions Order was quashed, and the Rate confirmed.

DE

Term. Sanct. Hill.

Anno 8 Georgii, 1722.

The King *versus* Gage.

UPON a Motion to quash a Conviction for keeping a Greyhound, and killing four Hares, for which Offence the Forfeiture is * 5 l. if not qualified; the Case was thus:

* 5 Annæ cap. 14. Confession of the Offence is a sufficient Conviction, tho' the Statute directs it shall be on Oath.

ff. The Statute directs, that the Conviction shall be made within three Months after the Offence, upon the Oath of one credi-

credible Witneſs, which was not done in this Caſe; for the Man was convicted upon his own Confeſſion, which is not within the Statute; and for that Reaſon, if the Juſtice of the Peace had ſeen him kill a Hare, he could not have convicted him upon his own View, becauſe that is not ſuch a Conviction as is required by this Statute, and he hath no Power in this Caſe, but what he deriveth from thence; therefore the Act ought to be purſued, and eſpecially where 'tis Penal, as this is, where the Forfeiture relates to the Conviction; and if 'tis not upon Oath as the Statute directs, then nothing is forfeited.

'Tis true, if this was an Offence at Common Law, it might be otherwiſe; but being made ſo by a particular Act of Parliament, the Method of Conviction muſt be purſued as therein directed.

'Tis like the Caſe of removing a poor Man to the Pariſh where he was laſt legally ſettled, which by the Statute is directed to be at the Complaint of the Churchwardens, and Overſeers of the Poor, *&c.* Now if all the Reſt of the Pariſh ſhould complain to the Juſtices, and not thoſe Pariſh-Officers, it would not juſtify their Making an Order to remove the Man, becauſe the Statute directs, that it muſt be made upon the Complaint of the Churchwardens and Overſeers of the Poor.

Econtra. On the other Side it was argued, that the Confeſſion of the Offender is within the Intention, tho' not within the Letter of the Statute; for the chief End of that Law was to give Juriſdiction to the Juſtices of the Peace; now the Confeſſion of the Party being the ſtrongeſt Evidence againſt himſelf, therefore where a Juſtice of the Peace convicts an Offender upon a better and ſtronger Evidence than required by the Statute, ſuch Conviction muſt be good, eſpecially ſince the Act is only directory, (viz.) That the Juſtices ſhall not convict without good Evidence.

As where a Statute directs, that a promiſſory Note, ſhall be payable to one, or his Order; yet where it was made payable to one alone without the Word Order, it was held good, and within the Statute.

Curia. By the Opinion of 3 Judges this is a good Conviction; for 'tis plain that the Defendant was guilty of the Offence; and if his Confeſſion had been made any where elſe, and not to the Juſtice of the Peace; yet if ſuch Confeſſion had been proved, the Juſtice might have convicted the Offender; now here was a ſtronger Evidence of his Guilt than required by the Statute; and therefore his Conviction ſhall be good.

If a Man comes into Court, and confeſſes himſelf guilty of High Treaſon, ſuch Confeſſion is good againſt him, and even in Penal Laws, the Intention of the Legiſlators is the beſt Method to conſtrue the Law; now the Intention of this Statute ſeems to be not in what Method or Manner of Proof the Offender ſhall be convicted, but that the Conviction ſhould be on good Proof, and a better cannot be had than the Confeſſion of the Party againſt himſelf.

The Legiſlators could not foreſee all the Caſes which might happen upon this Law; therefore the Conviction on Oath was only directory to the Juſtices of the Peace, and by the Civil Law no Man is to ſuffer without confeſſing the Crime of which he is accuſed, for this Conviction was affirmed.

But Juſtice Eyre was againſt it, for that by the Statute 22 Car. 2. he who keeps a Greyhound not being qualified, is puniſhable; and the Conviction is to be by Oath or Confeſſion of the Party, which Statute is confirmed by this of 5 Annæ, ſo that theſe Laws ſhall both ſtand together.

Now the Statute of 5 Annæ having directed that the Conviction ſhall be upon Oath, whereas the other is by Confeſſion or Oath; it ſeems that the Legiſlature by this laſt Act intended, that the Manner of Conviction by Confeſſion ſhould ſtill be on the Statute 22 Car. 2. and not on the Statute 5 Annæ, for by that Statute the Conviction is to be upon Oath; for if a Man might be convicted on this laſt Act on his own Confeſſion, there had been no Occaſion of confirming the Statute 22 Car. 2.

The King *verſus* Watſon.

Conviction of forcible Detainer quaſhed.

UPON a Motion to quaſh a Conviction for a forcible Detainer upon the * View of the Juſtices of Peace, the Objection was, that it was ſet forth, the Defendant held a Chamber in an Houſe in ſuch a Street, in the Pariſh of *St. Margaret Weſtminſter*, by Force; but did not alledge whoſe Houſe it was, or where it was ſituate, nor whether the Chamber was forward or backward, or how many Pair of Stairs were up to it; ſo that if there ſhould be two Chambers in this Houſe, the Sheriff could not know of which to deliver the Poſſeſſion.

* 15 Ric. 2. cap. 2.

Beſides, the Commitment of the Defendant was to Newgate, and it was not alledged that Newgate was the County-Gaol, and if not, then the Juſtices have no Power to commit thither, becauſe the Statute expreſly requires, that the Commitment ſhall be to the † County-Gaol.

† *See* the Statute, 'tis to the next Gaol.

To which it was answered, as to the first Objection, that this Conviction was very incertain as to the Chamber, &c. the Court will not intend, that there were two Chambers on one Floor; it ought to appear, that there were two, which it did not in this Case, and as to the House in which this Chamber was, that is sufficiently described.

The other is the most material Objection, (viz.) That by this Condiction and Commitment it did not appear, that it was to the County-Gaol; but as to that Matter that Court may judicially take Notice, that Newgate is the County-Gaol, and to prove this the Year-book, 16 Ed. 4. fol. 55. was cited.

But upon reading the Record, the Words in the Adjudication were all in the preterperfect Tense, when they ought to be in the present Tense, and for that Reason the Conviction was quashed, and in Trin. Term following, in the Case of the King *ver.* Morgan, there was the like Judgment for the same Fault.

The King *versus* Sprigg *and* Oakley.

Indictment for Piracy.

THE Defendants were tried at the Old-Baily upon an Indictment, for Piracy in burning and sinking a Ship near the Isle of Man; the Evidence was thus:

ſſ. Sprigg bought this Ship, and made the other Defendant Oakley Master thereof, and having freighted her, he insured 500 l. on the Ship, and 400 l. on the Cargo to the West-Indies.

Afterwards they put to Sea, and run the Goods upon the Coast of England, and they put to Sea again, and about two Days afterwards the Ship was sunk, and then he protested at the next Port, that both the Ship and Cargo were lost.

The Proof against the Master was, that the Day before this Ship was lost, he took Notice that the Ship's Boat was out of Repair, and desired some of the Men to stop the Chinks therein, for that he did not know how soon they might have Occasion to make use thereof.

That the next Day he desired one of the Sailors to see how deep the Water in the Pump was, who in a Quarter of an Hour before had pumped till it was no more than two Inches deep; but now to his great Surprize found it seven Inches deep; thereupon he and the rest of the Ship's Crew began and continued to pump, but still the Water became higher in the Ship, and within Half an Hour was fifteen Inches high.

There-

Thereupon this Sailor who first pumped, and some of the rest of the Ship's Crew, offered to go down into the Hold, but the Master would not suffer any of them to go down, nor any Body to be there besides himself and Sprigg, who was all the Time below, which was proved by the Sailors; and that the Water could not flow in so fast, unless the Ship was bored or broken in the Bottom.

The Proof against Sprigg, the Owner, was, that a Day before the Ship put to Sea he bought an Augre, which was an Inch and an Half wide in the Bore; that the Ship had Augres enough before, and that there was no Manner of Occasion for so wide an Augre, and that he was under Deck all the Time the Sailors were pumping, and as they believed, boring the Ship.

But the Evidence being only presumptive against both the Defendants, they were acquitted.

Nota; This differs from Mason's Case, for there the Goods of another were delivered upon a Special Trust to carry to Malaga, but here the Goods were the Property of Sprigg himself, and he could not be indicted for Stealing his own Goods, with an Intent to charge another, because there must be a felonious Taking as well as a Conversion; now there could be no felonious Taking, because he himself was the Owner, and in Possession of the Goods.

DE

Term. Paſchæ,

Anno 8 Georgii, 1723.

Wivell *verſus* Stapleton.

Poſt. 314, 381. What ſhall be mutual Covenants, and what not. Ant. 40, 41. Poſt. 105, 292.

BY certain Articles of Agreement for the Sale of South-Sea Stock, the Plaintiff covenanted on ſuch a Day to transfer ſo much Stock, upon Payment of 1638 l. and the Defendant covenanted to accept the ſame, and adtunc to pay the Money at or before the Shutting up the Books for the Chriſtmas Dividend; and it was farther agreed, that if the Defendant did not accept the ſaid Stock, then the Plaintiff might ſell it to any other Perſon at the Market Price, and return the Overplus, if it ſold at any higher Rate; but if it ſold at a lower Rate, then the Defendant agreed to make up the Deficiency to the Plaintiff.

And a Bond being given for the Performance of the Agreement, an Action of Debt was brought thereon; and the Breach aſſigned was, for that the Defendant did not pay the Deficiency of the ſaid Sum of 1638 l. for the Stock.

The Defendant pleaded, that he was to receive the Stock, &c. and that he made a Feoffment to the Plaintiff of ſuch Lands in Satisfaction of 1360 l. then due on the ſaid Covenant, &c. but did not aver that the Plaintiff accepted it in Satisfaction; nor did he ſet forth, that he made the Feoffment in Satisfaction of the Penalty then due, on the Forfeiture of the Bond; but upon a Demurrer to the Plea, the Defendant had Judgment in the Common Pleas, for Faults in the Declaration.

And

And now upon a Writ of Error in B. R. the Plaintiff in Error inſiſted, that theſe being mutual Covenants to pay Money on ſuch a Day, &c. and the other being to transfer the Stock, the Default of Payment on that Day is a Forfeiture of the Bond.

'Tis true, the Agreement was to pay the Money for the Stock, but the Word for in this Caſe doth not make it a precedent Condition, (viz.) That the Stock ſhould be actually transferred, or a Transfer tendered before the Money ſhould be paid, but that Particle for ſhews what the Conſideration was; ſo are the Caſes in * Saunders cited in the Margin; ſo that if the Agreement had gone no farther, theſe had been mutual Covenants.

* 1 Saund. 319. 2 Saund. 350.

'Tis true, there is a farther Agreement, that the Plaintiff himſelf might transfer to another, if the Defendant did not accept the Stock; but that being for his own Security, doth not alter the Nature of the mutual Covenant.

If it ſhould be objected, that the Declaration is ill, becauſe no Day or Place is ſet forth for the Transferring, or the Tender to transfer the Stock; the Anſwer is, that the Day is ſet forth, (viz.) That on ſuch a Day he was ready at the Office of the South-Sea Houſe, to transfer, &c. and this Tender at the Office is like the Tender of Rent at an Houſe, which is the moſt notorious Place of the Premiſſes demiſed, for the Office is the moſt notorious Place of the South-Sea Houſe; and by the Statute 6 Georgii, which is a publick Law, Notice is taken of that Houſe, ſo that the Court will intend that was the Place of Tender.

But if it ſhould not be ſo intended, yet the Defendant having pleaded, that he gave a Feoffment in Satisfaction of ſo much Money then due, this is an implied Admiſſion, that the Plaintiff had done every Thing neceſſary to be done, to entitle him to this Action; and ſo is Cro. Car. 384. 1 Vent. 114, 126.

'Tis true, thoſe Caſes were after Verdict, but as to this Matter, there is no material Difference between a Verdict and a Demurrer, when the Fault doth not touch the Point in Iſſue upon the Verdict, but ariſes on a collateral Matter.

It was argued for the Defendant, that the Judgment given in the Common Pleas was for the Faults in the Declaration, (viz.) for not ſetting forth, that he ſold the Stock to pay himſelf; and for not laying an actual Transfer, or a Tender of a Transfer, and for not aſſigning the Day and Place of ſuch Tender, according to the Reſolution in Lancaſhire and Killingworth's Caſe.

Econtra.

Now

Now, admitting the Plea is not good, yet if the Declaration is bad, the Plaintiff cannot have Judgment, and certainly that is not good, and if not, it cannot be helped by a bad Plea, for that is expressly resolved in 8 Rep. 120. (viz.) That if the Declaration is bad in Substance, no Implication in a Plea shall mend it, which is certainly true upon a Demurrer to the Plea; and so is Sid. 336. tho' it might be otherwise after a Verdict; and the Cases cited on the other Side were after a Verdict.

But this Declaration is ill; because the Plaintiff did not alledge, that he had actually transferred the Stock, or tendered to transfer it on such a Day, and at such a Place; and these are Omissions which make the Declaration ill; 'tis true, the Plaintiff hath alledged, that he was at the Office in the South-Sea House on such a Day, ready to transfer, but that is not good; for tho' an Act of Parliament takes Notice of the South-Sea House, and for that Reason it may be intended the Place of Transfer, yet it doth not take Notice at what Time it was to be done, nor of any Thing to be done at the South-Sea House; therefore the Plaintiff should have set forth at what Time he was there, and that he stayed till the last Hour of the Day, for that is the Time appointed by the Law to make a Tender, unless there is a special Custom to the contrary, and no such Custom is alledged.

Tender, how to be pleaded.

But the Time alone is not sufficient, without setting forth the Place of Tender, which was not done; and as to the Transfer, the Words in this Agreement adtunc to pay the Money, must relate to the Transfer, and not to the Day of Payment; as in Lutw. 490. where the Covenant was, that the Plaintiff would accept so many Shares, on such a Day and ad idem tempus to pay, &c. there these Words ad idem tempus were adjudged to relate to the Time of the Acceptance of the Shares, and not to the Day of the Payment of the Money; and this Case differs from the Case of Blackwell and Nash, for there the Money was to be paid at or before such a Day.

Curia.

The Plaintiff, who sold the Stock, was to transfer it on such a Day, on Payment of so much Money, and the Defendant was to receive the Stock and then to pay the Money; this being the Case, the Question is, Whether these are mutual Covenants, and three Judges held they were not, but that they were independant Covenants; and that the Plaintiff need not set forth in his Declaration, that he tendered to transfer, &c. because it was to be transferred upon Payment of the Money; so that the Defendant having by this Agreement made himself the first Agent, he was obliged to pay the

Money before the Plaintiff was to transfer the Stock; and then if he ſhould deny or refuſe to transfer, the Defendant might have an Action to compel him, becauſe he is entitled to the whole Stock; for the Plaintiff had no Authority to ſell it till the Defendant had refuſed to accept it; therefore he being entitled to the whole Stock, the Plaintiff is entitled to the whole Money agreed to be paid for it, and may well maintain this Action, and for this Reaſon the Judgment was reverſed by the Opinion of three Judges.

But Juſtice Eyre held, that the Judgment in the Common Pleas ought to be affirmed, and firſt he denied, that the Plea made the Declaration good; for a bad Plea can never mend a bad Declaration, eſpecially if both are bad in Subſtance as theſe are.

And as to the principal Point, he was of Opinion, that theſe were mutual, and not reciprocal Covenants as to the Transferring the Stock and Payment of the Money; and that upon ſuch a Covenant, the Plaintiff might maintain an Action without laying in his Declaration an actual Transfer or Tender to transfer the Stock; but that this Action was brought for a Deficiency of 1638 l. after the Plaintiff had raiſed 322 l. by the Sale of the Stock to pay himſelf, ſo that the Breach was aſſigned upon an independent, and not upon a mutual Covenant.

Now by the expreſs Agreement ſuch Sale of the Stock was not to be made until the Defendant failed in Payment of the 1638 l. and it doth not appear by this Record, that he did fail in Payment thereof; for to ſhew ſuch Failure, the Plaintiff ought to ſet forth, that he did tender a Transfer in due Time and Place, and that on the laſt Hour of the Day, becauſe the Law hath made that the Time of Tender, unleſs there is a ſpecial Cuſtom to the contrary, which is not to be intended againſt this Implication of Law. Tender when to be made.

There is likewiſe another Fault in this Declaration, for by this Agreement (if the Defendant ſhould refuſe to accept the Stock) the Plaintiff had Authority to ſell it at the Market-Price; but he hath not ſet forth in his Declaration, that he ſold it at the Market-Price which he ought to have done, becauſe he was to refund to the Defendant the Surplus of the Money after he had paid himſelf; 'tis true, the Defendant was to make up the Deficiency, but the Plaintiff hath laid the Non-payment thereof as a Breach of this Agreement, without ſhewing what Right he had to it; and he cannot have a double Remedy, (viz.) One for Non-payment of the Deficiency, and another for the Breach of the mutual Covenant.

He agreed that the Plaintiff had assigned a Breach of the mutual Covenant, but that he did not rely on it; but went farther by saying, that he paid himself 322 l. therefore he should shew that he had a Right so to do; so that this Breach which he had assigned was only as a general Breach, and introductive to his Action, the real Cause whereof was the second Breach assigned, (viz.) The Non-payment of the Deficiency.

Now if there was not a sufficient Tender of the Transfer, the Plaintiff could not entitle himself to this Action upon the second Breach assigned, because he did not lay a Tender in proper Time and Place; for if the Office at the South-Sea House was not a proper Place of Tender, or to transfer the Stock, then the Plaintiff could not bring his Action for this Deficiency; and for ought it appears to the Court, the Defendant was ready to pay the Money at the Time and Place, because it doth not appear, that the Plaintiff was there at the last Hour it could be tendered.

But afterwards in Michaelmas-Term, 11 Georgii, the Judgment was reversed, by the Opinion of the Chief Justice and two other Judges.

Lovelock *versus* Sorrel.

Covenant for not repairing brought against an Assignee of an Assignee; the Plaintiff need not set forth the intermediate Assignments.

A Lease was made to W. R. and afterwards the Lessor brought an Action of Covenant against the Assignee of an Assignee, for not repairing, but did not set forth the intermediate Assignments.

The Defendant pleaded, that this Lease did not come to him by any mesne Assignment of the Lessee, to which Plea the Plaintiff demurred.

And it was insisted for him to maintain the Demurrer, that the Plea was too general, and altogether immaterial; for if the Defendant had the Land by any Assignment from the original Lessee, he is subject to this Covenant; therefore he should have pleaded, that the Lease did not come to him, and not that it did not come to him by any mesne Assignment, and so is 1 Sand. 238, 285. and 2 Sand. 188.

Econtra.

On the other Side it was argued for the Defendant, that in an Action of Covenant against an Assignee of a Lessee, the Plaintiff should specially set forth all the intermediate Assignments, and shew how the Defendant came to the Land, and not as Assignee generally.

But

But this was denied by the Court, and adjudged, that the Declaration was good againſt the Defendant as Aſſignee general, becauſe it may often happen, that the Leſſor may not know all the intermediate Aſſignments. Curia.

There was no Judgment given this Term, but in Trinity-Term following, an Objection was made to the Declaration, (viz.) That the Plaintiff had declared on a Leaſe for Years adhuc venturam, when by the very Record it appeared, that the Leaſe was expired by the Effluxion of Time; therefore he had declared on another Leaſe, but the Court gave no Judgment as to this Point; but ſaid, that in all Actions of Trover, the uſual Form of declaring was, that the Goods came to the Defendant per inventionem; but it would certainly be an immaterial Plea, if the Defendant ſhould deny the Finding, as in 1 Sand. 238. *&c.* See 2 Mod. 217. Shore 155.

Anonimus.

A Judgment was given in the King's Bench, and upon a Writ of Error brought in the Exchequer-Chamber, that Judgment was affirmed; and now the Plaintiff in the Action brought a Scire facias for the Coſts he had ſuſtained by the Delay of the Execution; and it was objected, that it ought not to be allowed, becauſe it was brought in London, and not in Middleſex where it ought to be brought; and for a Default in the Writ it ſelf, becauſe it did not ſet forth what became of the Caſe in the Exchequer-Chamber, (i. e.) it did not ſhew that the Judgment was affirmed; for if it was not, then the Plaintiff hath no Right to the Coſts.

Sci' fa' will not lie for Coſts without ſhewing that the Judgment was affirmed in the Exchequer-Chamber.

On the other Side it was anſwered, that a Scire facias may be laid in any County where the original Action was brought; and all that is neceſſary to be alledged in it, is, that Judgment was given for the Plaintiff, and is not ſatisfied.

So if an Action of Debt ſhould be brought on the original Judgment, ſuch Action might be laid in any County, and the Scire facias may be brought where that Judgment was obtained.

'Tis true, an Action of Debt upon the original Judgment, or upon a Recogniſance, may be laid in any County, but a Scire facias muſt always go into that County where the Execution on the original Judgment ſhould be made. Curia.

Afterwards upon reading this Sci' fa' it was as before obſerved, that it did not ſet forth what became of the Cauſe in the Exchequer-Chamber, and certainly the Plaintiff cannot have this Writ without ſhewing what became of the Judgment removed by this Writ of Error; and 'tis unreaſonable he ſhould have it for Coſts in Delay of Execution, without ſhewing that the Judgment was affirmed in the Exchequer-Chamber.

The King *verſus* Maſon.

Indictment for Piracy.

THE Defendant who was Maſter of a Ship, was indicted and tried upon ſeveral Indictments at the Old-Baily, before Sir Henry Penrice Judge of the Admiralty, and ſeveral other Civilians, and before ſome Judges of the Common Law aſſiſting them; and this by Virtue of a * Commiſſion under the Great Seal, &c.

* According to the Statute 28 H. 8. cap. 15.

The firſt Indictment on which he was tried, was for maliciouſly and piratically burning a Ship, to the great Damage and defrauding both the Owners and Inſurers, contra pacem, &c. & contra formam ſtatuti, &c.

The Fact upon the Trial appeared to be as followeth:

ſſ. The Ship was laden with Linen at Rotterdam, and bound for Malaga in Spain, and when the Defendant received the Bill of Lading he was ordered by the Merchants and Owners to put in at Lynn Regis in Norfolk, in order to get a Mediterranean Paſs for his Safety; and when he came near Dartmouth-Bay, it was proved by one Witneſs (who was the Carpenter of the Ship) that the Defendant tampered with him to know what he would take to knock the Ship in the Head; and it was proved by another Witneſs, that the Defendant gave the Ship's Crew ſome Bowls of Punch on that Day the Ship was burnt, and made them all drunk; and afterwards ordered this Witneſs to make a Fire in the Cabin, where there was none for a Month before that Time; which he did when the Defendant and moſt of the Crew were going aſhore except two who were very drunk; and that there was but one Bucket belonging to the Ship, which the Defendant had ordered a Sailor to fling overboard the Day before the Ship was burnt.

The two Sailors who remained drunk in the Ship, made Oath, that they were ſleeping there till the Ship was ſo much on Fire that they could not relieve her nor themſelves, but that they were carried off by another Ship's Boat then in the Harbour.

Upon this Evidence the Preſumption was very ſtrong, that the Ship was burnt by that Fire which was firſt made in the Cabin; but this being only Preſumption, and no direct Proof, the Defendant was acquitted.

He was afterwards tried upon another Indictment for Piracy, in ſtealing the Goods which he had at Rotterdam on Ship-board, and conſigned to ſuch a Place, (viz.) to Malaga; and the Evidence againſt him was, that the Goods were delivered to him, and that afterwards he got both the Ship and Cargo inſured at London and Rotterdam; and when he came to the Coaſts of England, he privately run all the Goods, and when the Ship happened to be burnt, he came to Dartmouth and proteſted both Ship and Cargo as burnt and loſt (according to the Method of Proteſting inſured Ships) tho' the Cargo was privately run by him as before-mentioned, which was proved by ſeveral Witneſſes.

To prove the Delivery of the Goods to him, an Exemplification of the Entry thereof was offered in Evidence, which Entry was made in the Cuſtom-houſe Books at Rotterdam, and atteſted by a publick Notary, and ſealed with the publick Seal there; but the Court would not admit this Exemplification to be given in Evidence; thereupon the Owner of the Goods proved the Property and the Delivery, &c.

The Counſel for the King againſt the Defendant laid down this for a Rule, (viz.) That all Acts which amount to Felony at Land, the ſame would amount to Piracy at Sea; that upon this Evidence it plainly appeared, that the Defendant had run the Goods Animo furandi, which if done at Land would be Felony; as for Inſtance; if Goods are delivered to a Carrier, and he ſteals them animo furandi, 'tis Felony, and ſo is this Piracy; for it appears by his Proteſting that the Ship and Cargo was burnt and loſt, that he deſigned to cheat both the Owners and Inſurers.

'Tis true, if a Maſter of a Ship runs Goods, with an Intention to cheat the King of the Duties, this is no Piracy, tho' the Goods ſhould happen to be ſeiſed as forfeited to the Crown for not paying the Duties.

But here by the Defendant's Proteſting the Goods to be loſt, when they were not, but privately run by him, this muſt be with an Intention to cheat and defraud the Owners, for it was done animo furandi, and his Intention makes it Piracy, as a felonious Intent makes the Action Felony.

The Defendant produced an Inſtrument in Writing, under the Merchant's Hand who freighted this Ship (as he pretended) by which he had Authority to run the Goods, as he ſhould

find Opportunity; but upon Inquiry and Proof this ſeemed to be a Forgery, for the Merchant, on Oath, denied his Signing the Inſtrument; and the Witneſs to it being now produced to prove the Signing it, made Oath, that he did not know the Merchant therein mentioned, but that the Defendant and another were at a publick Houſe in Rotterdam, and ſent for this Witneſs, who came, and then the Defendant told him, that the other Perſon there preſent was his Merchant; and that he ſent for him to be a Witneſs to the Power his Merchant gave him; and thereupon the Inſtrument being ready drawn, that other Perſon ſigned it, and this Witneſs atteſted it; all which gave Room for a Preſumption, that he intended the Running the Goods before he left Holland, animo furandi.

But notwithſtanding this Evidence, the Judge of the Common Law, who aſſiſted the Judge of the Admiralty, directed the Jury to acquit the Defendant, for that the Goods were delivered to him upon a ſpecial Truſt to deliver them at Malaga, and that it could be no Piracy to convert thoſe Goods in a fraudulent Manner, until that ſpecial Truſt was determined, no more than it could be Felony in a Carrier by converting of Goods delivered to him to carry to ſuch a Place before that ſpecial Truſt was determined; and this appears to be the Law of England by concurrent Reſolutions in ſeveral * Law-Books.

* 3 Inſt. 107. Hale's Pleas of the Crown 61. Staundf. 25. 13 Ed. 4. 9. *Kelynge 81.

Thereupon the Counſel for the King inſiſted, that tho' this was not Piracy before the ſpecial Truſt was determined, yet the Breaking open ſome Bales of Linen on board this Ship made it Piracy, for this was a Converſion with Force and animo furandi; and that it would be Felony in a Carrier to break open any Boxes delivered to him, and to convert them animo furandi, for ſuch a Converſion by Force is Felony, tho' the ſpecial Truſt was not determined.

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* *Nota*; The Caſe in *Kelynge* 81. was thus: *ſ.* A Man came to *Smithfield* Market to ſell a Horſe, and a Jockey coming thither to buy a Horſe, the Owner delivered his Horſe to the Jockey to ride up and down the Market to try his Paces, but inſtead of that the Jockey rode away with the Horſe; this was adjudged Felony.

And certainly 'tis Felony, but different from *Maſon*'s Caſe before-mentioned, becauſe the Horſe was not delivered to the Jockey upon any ſpecial Truſt, as the Cargo was to *Maſon*, but was only a general Delivery, and no more than the common Caſe of a Shop-keeper, ſhewing or delivering Goods in his Shop to his Cuſtomers, where a Converſion of ſuch Goods is certainly Felony.

But the Delivery of Goods upon a *ſpecial Truſt* is commonly publick and notorious, and therefore if the Party converts them before that Truſt is determined, 'tis not Felony, becauſe he may have a proper Remedy by a civil Action, (*viz.*) By an Action of Trover to recover Damages.

But the Court held there was a Difference between Opening Bales of Linen, and Breaking open Locks or Nails of Boxes by a Carrier, and that this was no Piracy; whereupon the Jury acquitted the Defendant of this Indictment.

And he was afterwards tried upon a third Indictment for a Cheat, in committing the Acts aforeſaid, and was found guilty; and fined and impriſoned till he paid the Fine.

Coke *verſus* Allen.

ERROR in B. R. upon a Judgment given in the Court of Common Pleas; and the Error aſſigned was, for not filing a Warrant of Attorney, as required by the late * Statute for the Amendment of the Law, by which 'tis enacted, that the Attorney for the Plaintiff ſhall file his Warrant the ſame Term in which he declares, and the Attorney for the Defendant in the ſame Term in which he appears; but this was over-ruled; for if the Plaintiff's Attorney file the Warrant at any Time before the Defendant hath pleaded, 'tis ſufficient to maintain the Judgment, tho' by the ſaid Statute he may be fined if he doth not file it in the Term when he declares; but the not Filing it in Manner, as aforeſaid, doth not impeach the Judgment.

Warrant of Attorney may be filed at any Time before the Defendant pleads.
* 4 & 5 Ann. cap. 16.

Spackman *verſus* Huſſey.

THE Plaintiff declared in the Marſhal's Court upon an Inſimul computaſſet infra juriſdictionem, &c. and had Judgment; and now upon a Motion to ſet it aſide, it was inſiſted, that the Account doth not alter the Duty, for that may ariſe in York; and no other Conſideration being laid to entitle the Court to any Jurisdiction, the Judgment ought not to ſtand; but adjudged, that the Account was ſufficient to give the Court a Juriſdiction.

Inſimul computaſſet infra juriſdictionem, good.

DE

DE
Term. Sanct. Trin.

Anno 8 Georgii, 1723.

Tucker *verſus* Goldburne.

In Debt upon the Aſſignment of a Bail-Bond, the Proceſs on which the Arreſt was made muſt be ſet forth. * Cro. Eliz. 647. Sid. 159.

AN Action of Debt was brought upon an Aſſignment of a Bail-Bond taken by the Sheriff, who had arreſted the Defendant upon a Capias, &c. and upon a Demurrer to the Declaration, it was objected, that the Plaintiff had not ſet forth the Capias, or the Teſte or Return of any * Capias, as he ought to have done; and the Court of Common Pleas being of that Opinion, a Writ of Error was brought in B. R. but the Judgment of the Common Pleas was affirmed, for 'tis the Capias which gives Life to the Bond.

Moor *verſus* Thompſon.

Where the Jury may ſever the Damages for which the Plaintiff hath declared.

IN an Action of Treſpaſs brought by the Plaintiff in the Court of Common Pleas, for entering on his (the Plaintiff's) Land 25 March, 4 Geo. with a Continuando the ſaid Treſpaſs to the 25 March, 6 Geo. (which was two Years), &c. ad damnum, &c.

The Defendant juſtified, by the Command of one Green, the Plaintiff replied, and ſet forth a Surrender made to him, (the Lands being Copyhold) and that he was admitted a whole Year before he brought this Action of Treſpaſs, &c. and at the Trial there was a Verdict for the Plaintiff; and the Jury gave Damages for that Year only, whereas the Plaintiff had declared for two Years Damages; and now up-

on a Writ of Error brought, it was inſiſted, that tho' the Plaintiff had a Verdict, yet if the Jury did not find enough, 'tis an inſufficient finding, and here they had found Damages only for one Year, where the Plaintiff had declared for two Years Damages, and the Jury cannot ſever the Damages for which the Plaintiff had declared; but this was over-ruled by the Court, and the Judgment affirmed.

Colebrook *verſus* Diggs.

Where the Defendant muſt enter into a new Recogniſance of Bail.

ERROR in the Exchequer-Chamber upon a Judgment given in B. R. and there the Judgment was affirmed; afterwards a Writ of Error was brought in the Houſe of Peers; and the Plaintiff in the original Action being about to take out Execution againſt the Defendant, for not entring Bail according to the Statute * 3 Jac. by which 'tis enacted, That no Execution ſhall be ſtayed on any Writ of Error, or *Superſedeas* for reverſing a Judgment in any Action of Debt or Contract, unleſs the Plaintiff in Error ſhall firſt be bound with two ſufficient Securities (ſuch as the Court ſhall approve) to the Party for whom the Judgment was given by Recogniſance in the ſame Court, in double the Sum: Adjudged to proſecute his Writ of Error with Effect, and that if the Judgment is affirmed, then to pay all Debts, Damages and Coſts ſo adjudged, and all Coſts and Damages for delaying the Execution by the Writ of Error, *&c.*

* 3 Jac. 1. cap. 8. *See* 16 & 17 Car. 2. c. 8.

Now the Defendant having already entered into ſuch a Recogniſance in B. R. before the Writ of Error was allowed, it was inſiſted for him, that he is not obliged by this Statute to give a new Recogniſance of Bail, having already purſued the Statute by giving Bail in that Court where the Judgment was given, and it would be very hard for him to be bound in two Recogniſances for one and the ſame Matter.

Econtra.

On the other Side it was inſiſted, that this Matter is ſo plain, that it was never controverted, for upon a Writ of Error in Parliament, the Plaintiff in Error muſt alledge the Judgment in B. R. to be erroneous, as well as the Judgment in the Exchequer-Chamber; and this Writ is brought in Delay of Execution of the Judgment; but the firſt Recogniſance doth not extend to the Coſts ſuſtained in the Houſe of Peers, but only to the Coſts for delaying the Execution by the firſt Writ of Error, ſo that if a new Recogniſance ſhould not be given, the Coſts upon the Writ of Error in Parliament, if the Judgment ſhould be affirmed would be loſt.

'Tis

'Tis true, the Statute enacts, That Bail ſhall be given in the ſame Court where the Judgment was given; but this is only explanatory, and intended that it ſhould be given where the Judgment was of Record.

Curia. The Intent of this Statute is, that the Party ſhall not loſe his Damages and Coſts for delaying Execution of a Judgment by a Writ of Error; now the Judgment given in the Exchequer-Chamber in Affirmance of the Judgment in B. R. remands the Record back again into that Court; and if ſo, then there is no Record of the Judgment given in the Exchequer-Chamber; and therefore the Writ of Error in Parliament is directed to the Chief Juſtice of B. R. where the Record remains, and the Judgment muſt be deemed as a Judgment of that Court as to the Writ of Error, and all Incidents thereof, ſuch as putting in Bail, &c.

And there is no manner of Inconvenience by entering into two Recogniſances; for both are the ſame in reſpect to the Plaintiff in Error, becauſe by the late Statute he hath a proper Remedy, if the Plaintiff in the original Action take out Execution for more than is due, but it would be very inconvenient for him to be delayed by a Writ of Error, and to have no ſufficient Security to make Satisfaction for his Loſs.

* Luck's *Caſe.* Hob. 247. There is a * Caſe where an Executor was obliged to give Bail in the Chamberlain of London's Court, and likewiſe Bail for the ſame Thing in the Spiritual Court, and ſo double Bail; and this was warranted only by a particular Cuſtom in London, which is not to be favoured ſo much as a general Statute made for the Advancement of Juſtice, ſo the Party was ruled to put in † new Bail in B. R.

† Tilly *verſ.* Richardſon. 1 Salk. 97. S. P.

Wilkinſon *verſus* Matthews.

The Plain- was taken upon an EſcapeWarrant after a Day-rule. UPON a Motion for an Attachment againſt the Defendant for taking the Plaintiff upon an Eſcape-Warrant, after he had obtained a Day-Rule; it was ruled, that the Defendant ſhould ſhew Cauſe on ſuch a Day why an Attachment ſhould not go; and afterwards upon that Day he ſhewed for Cauſe, that the Taking upon this Warrant was about eight of the Clock in the Morning, and long before the Court was ſate, ſo that the Plaintiff could not have a Day-Rule at that Time; but this was over-ruled, becauſe in this Caſe there ſhall be no Fraction of a Day, and the Opinion of the late Chief Juſtice Holt was now mentioned, (viz.) That where a Perſon is taken upon an Eſcape-Warrant,

who had obtained a Rule for that Day, that the Profecutor ſhall be committed; and that it was ſufficient if the Party had delivered his Name in Writing to the Clerk the Night before the Day he moved for a Day-Rule, as ſoon as the Court ſhould ſit; but it appearing in the principal Caſe, that the Day-Rule was obtained after the Party was taken upon the Eſcape-Warrant, on Purpoſe to avoid the Commitment by Virtue of that Warrant; and that his Name was not delivered to the Clerk the Night before, but a little Time before the Court ſate; it was ruled, that he ſhould continue in Cuſtody.

The King *verſus* Ackworth & al'.

Where a negative Oath ſhall be preferred to an affirmative.

UPON a Motion for an Attachment againſt the Defendants upon an Affidavit of their withdrawing a Witneſs from giving Evidence at the Aſſiſes in a Trial had there upon an Information againſt certain Smugglers; it was ſhewed for Cauſe why an Attachment ſhould not go, (viz.) That the Defendants had Affidavits to diſprove the Charge made againſt them by the Affidavits of the Plaintiff; thereupon thoſe Affidavits were now read in Court; and it was affirmed to be the conſtant Practice, that tho' the Affidavits produced by the Plaintiff, were very full as to the Charge, yet if the Perſon denied ſuch Charge by as plain and poſitive Affidavits, in ſuch Caſe he ſhould be diſcharged, and an Attachment ſhould not go; and that if ſuch Affidavits were not true, then the Plaintiff had a proper Remedy, which was by indicting them for Perjury.

And becauſe a Man ſhall not be kept in Cuſtody, and deprived of his Liberty by an Attachment; therefore this is the only Caſe where a negative Oath ſhall be preferred to an affirmative: all which was agreed by the Court, but that the preſent Caſe differed; for the Defendant did not by his Affidavit plainly deny the Fact with which he was charged.

DE

Term. Sanct. Mich.

Anno 9 Georgii, 1723.

The King *verſus* Layer.

The Defendant was attainted of Treaſon.

THE Defendant Chriſtofer Layer being committed to the Tower for High Treaſon, was afterwards brought up by Habeas Corpus to the Bar; and the Indictment againſt him being read, his Counſel moved that the Irons might be ſtruck off his Legs, and inſtanced the Caſes of Gordon, King and others, where it had been ſo done before they pleaded; and that it was the Opinion of the late Chief Juſtice Holt, that it ought to be ſo done; that this Perſon was the firſt Tower Priſoner that ever had Irons on his Legs, and that there were no ſuch Inſtruments there till now brought from Newgate; and the Priſoner himſelf moved, that the Irons might be taken off before he pleaded, becauſe lying in his Cloaths all Night, and other Inconveniencies occaſioned by thoſe Irons were ſo painful to him, that he being deprived of his Reſt, had not the free Uſe of his Reaſon; that he hoped to have a fair Trial as allowed by the Law, without any undue Severities, and he complained of ſome ill Uſage as he was bringing to the Hall.

Keilyng 10.

Moved that his Irons might be taken off before he pleads to his Indictment.

To which it was anſwered by the Court, that they could not take Notice of ſuch ill Uſage, becauſe they did not know by whom it was done; and as for the Irons to be taken from his Legs, 'tis true, it was done in thoſe Caſes cited by his Counſel; but it was where the Priſoners had pleaded to their ſeveral Indictments, and were to be tried on the ſame Day; and that it would be to no Purpoſe to inſiſt on this Mat-

ter for ſo little a Time as the Priſoner now had to ſtand at the Bar; and as for Taking them off in the Tower, the Court would make no Order, becauſe if they did, it might be an Excuſe to his Keeper, if he (the Priſoner) ſhould eſcape, therefore it muſt be left to his (the Keeper's) Diſcretion, how to uſe his Priſoner, eſpecially ſince he had already attempted to eſcape.

Then the Court recommended it to his (the Priſoner's) Counſel, that if they had any Exceptions to the Indictment, they would now ſhew what thoſe Exceptions were; whereupon they made the Exceptions following:

Exceptions to the Indictment.

1ſt. Miſpelling, Falſe Latin, Nonſenſe and Surpluſage, and that there were inſignificant and inſenſible Words in the very Commiſſion, by Virtue whereof this Indictment was found, as plenius Veritat, which Words cannot be conſtrued to any Manner of Senſe.

And firſt as to the Miſpelling, he (the Priſoner) is called in the Indictment Chriſtopherus, with an e, when it ſhould be with an o, as Chriſtophorus.

To which the Court anſwered, that they did not know what his Name was, and probably he might be baptiſed by that Name; but if he was not, then it might be pleaded in Abatement; and tho' the Lexicons and Dictionaries might warrant Chriſtoforus to be the right Name, yet the other might likewiſe be a Name of Baptiſm.

Then it was objected againſt the Words in this Indictment, (viz.) That he (the Priſoner) compaſſavit imaginatus fuit & intendebat ad ſeſiend. the King, &c. Now here the Conjunction copulative Et ſhould have joined the Word intendebat to the ſame Mood and Tenſe, but inſtead thereof 'tis joined to Verbs of the præterperfect Tenſe, &c. therefore 'tis incongruous Latin, and improper in an Indictment, and make it vitious; beſides, the Word ad ſeſiend. the King, is an inſignificant Word, not known in the Law, or in any Latin Author; and for theſe Reaſons this Indictment ought to be quaſhed, and the rather, becauſe all Forms of Indictments, eſpecially in High Treaſon, ought to be very certain. 7 Rep. 5.

To which it was anſwered, that as to the Fault objected to the Commiſſion, by Virtue whereof this Indictment was taken, this Court hath no Power over it ſo as to quaſh the Indictment; but tho' the Objection is, that plenius veritat cannot be conſtrued to any Manner of Senſe, yet by tranſpoſing the Words it may be made good Senſe.

To which it was anſwered.

Then as to the Miſpelling the Priſoner's Name, he may plead that Matter in Abatement, for he may be as well known

by the Name of Chriſtoferus as by the Name of Chriſtofer; and this Objection deſerves no other Anſwer.

'Tis true, the Verbs are not all in the ſame Tenſe; but tho' they are not, and that the præter Tenſe is coupled to the præterperfect Tenſe, yet that is not material, and ſhall not make this Indictment naught.

And as to the Word ad ſeſiend, it being only an overt Proof of the Deſign; 'tis well enough if any Proof is made of an Overt-act of the Things laid in the Indictment; beſides 'tis not a Word unknown in the Law, for 'tis uſed every Day in the Court of Exchequer, where Seſire facias are Words in a Writ ſent to the Sheriff, and he returns Seſiri feci.

Miſnoſmer pleaded in Abatement.

Then the Priſoner pleaded Miſnoſmer in Abatement, and his Plea was received, read and filed, and afterwards he was ſent back to the Tower, and ordered to be brought again to the Bar on Saturday in Cro. animarum; and being accordingly brought up on that Day, (viz.) 3 Novemb. the Attorney General demurred to the Plea, and prayed that the Priſoner might join in Demurrer.

Demurrer to it, and no Time given to join in Demurrer.

But his Counſel deſired Time to reply, or to join in Demurrer, and the rather, becauſe in Fitzharris's Caſe four Days were given by this Court, which is ſome Proof that 'tis the Courſe of the Court to allow Time to plead in ſuch Caſes; and thereupon the chief Clerk of the Crown-Office being asked what was the Cuſtom of the Court in this Matter, he anſwered, that in Criminal Caſes there were Precedents, where, upon Demurrer, Time was given to join in Demurrer, but never in Capital Caſes.

Whereupon the Counſel for the Priſoner argued, that if Time was given in Criminal Caſes, a fortiori it ſhould be allowed in Capital Caſes.

But the King's Counſel replied, that no Inſtance could be given, where in capital Caſes a Day had been allowed to join in Demurrer, becauſe the Priſoner can do nothing elſe; therefore where he pleads in Abatement, he ſhould always be prepared to maintain his Plea.

As to Fitzharris's Caſe, 'tis rather an Authority againſt the Priſoner than for him, for that was a Plea to the Juriſdiction of this Court, to which there was a Demurrer, and Fitzharris immediately joined in Demurrer; 'tis true, in the preſent Caſe, Life is concerned, but not ſo immediately; and this Plea is ſo frivolous that it ſcarce deſerves an Anſwer, it being only a pretended Miſtake of a Letter in the Priſoner's Name of Baptiſm, when there are uncontrolable Authorities, that 'tis ſpelt both Ways; and Notice was given of

this Demurrer yesterday, and a Copy thereof sent to each of his Counsel, so that greater Indulgence hath been shewed to him than formerly to Fitzharris, or to the Lord Preston, who upon his Trial at the Old Baily, before the Chief Justice Holt, for High Treason, pleaded his Patent of Peerage, but was denied Time to produce it.

This was admitted by the Counsel for the Prisoner, but the Reason why Time was denied to produce the Patent was, because the Lord Preston pleaded, that it was dated at St. Germans; and it would have been a Dishonour to the Court to proceed in the Examination of Letters Patents granted by the late King James after his Abdication, because every Act done by him afterwards as King, was absolutely void.

Upon the whole Matter the Court held, that Time was never yet given in capital Cases to join in Demurrer, and said that what was now offered as a Plea was first offered as an Exception to the Indictment, and that the Prisoner's Counsel were then ready to argue it as an Exception, and why not now when 'tis a Plea; 'tis true, they have mentioned Fitzharris's Case as an Instance, where four Days were allowed by this Court for him to join in Demurrer; but that is so far from being a Case in Point, that it widely differs from the present Case; for there the Cause of Delay and Contest was between the Prerogative of the King and the Privilege of the House of Commons, which were extraordinary Things, and to be well considered before Fitzharris could be tried; now in the present Case the Prisoner cannot withdraw his Plea, without Leave of the Attorney General, who having demurred to it, the Prisoner hath nothing more to do than to join in Demurrer, and all the Proceedings in such Cases are instanter.

The Prisoner answered, that he did not affect any unreasonable Delays, but that he was willing to withdraw his Plea in Abatement, and to plead in Chief, though he had a Joinder in Demurrer ready engrossed; but he moved for a Rule, that his Wife and Sister might be permitted to visit him under such Restrictions which the Court should think fit; and a Rule being about to be made, that his Wife might come to him, being first searched; but as to his Sister, that it should be left to the Discretion of the Keeper;

Rule made for his Friends and Relations to visit him.

It was objected against this Rule by the Counsel for the King, that the like had never been made; it was denied to Fitzharris, and only an Intimation given to the Keeper, that it might be expedient for his Friends and Relations to visit him.

But

But the Chief Justice said, that it was true, the Wife of Fitzharris was denied to come to her Husband, probably because she had misbehaved her self by throwing his Plea into the Court when it was not signed; and it was now affirmed, that there had been Rules made by this Court of the like Nature; but if there had not, yet it was in the Power of the Court to make a Rule to oblige the Keeper to permit the Prisoner's Friends to come to him under proper Restrictions; and a Rule was made accordingly.

Then the Prisoner moved for a Subpœna ad testificandum to be directed to his Witnesses, and for an Habeas Corpus ad testificandum to be directed to the Lords Orrery, and North and Grey, who were then Prisoners in the Tower; and this was upon an Affidavit, that he believed they would be material Witnesses for him at his Trial; and he likewise moved for a Rule, that he might have Copies of all the Papers in the Keeping of the Secretary of State, which were intended to be produced in Evidence against him.

To which it was answered, that it was Time enough for such a Motion, so he was remanded to the Tower, and his Trial ordered to be on Wednesday the 21st of November.

The Panel was called over.

At which Day he being brought to the Bar, the Jury were called by the Clerk of the Crown-Office, and he was desired to except against as many as he thought fit, so far as the Law allowed; thereupon he moved, that the Panel might be called over, that he might know who appeared, and who not, which, after some Opposition, was done.

Challenged 36.

Then the Clerk called over the Panel, and the Prisoner challenged 34 peremptorily, and two more principally, for saying in Essex, that they hoped to see him hanged; and he challenged four more for Want of sufficient Freehold within the County, within the Meaning of the Statute * 7 Willi. by which 'tis enacted, that they must have 10 l. per Annum, which Challenges were allowed.

* 7 & 8 W. 3. cap. 32. *See* 4 & 5 W. 3. cap. 24.

Challenge for the King, not shewing any Cause.

Then the Attorney General challenged eight for the King, but is not by Law obliged to shew any Cause of such Challenge before they had gone thro' the Panel; for if those who appeared were not enough to make up a Jury, then those eight might be sworn.

But the Jury being full without them, and now sworn, the first Witness produced against the Prisoner was one Stephen Lynch, who deposed that he and the Prisoner did often consult together, and propose Methods how to seise the Tower, and the Lord Cadogan, the Lord Townshend, and Mr. * Walpole, and the Bank of England, and to give the Arms in

Stephen Lynch.

* *Now* Sir Robert Walpole.

the Tower to the Priſoners, and others in the Mint, and to the Mob, and likewiſe to ſeiſe the King and the Prince; and that on the 24th Day of Auguſt laſt, the Priſoner did read a Declaration, and gave it to him (this Witneſs) to read at the Sign of the Green-Man in † Layton-Stone in Eſſex, which was to be ſent all over England, as ſoon as they had ſeiſed the City of London; that he (this Witneſs) was the Perſon appointed to ſeiſe the Lord Cadogan, and that he was to have as many Men as he ſhould chooſe for that Enterpiſe; and that accordingly he (this Witneſs,) and the Priſoner went to view that Lord's Houſe, to whom the Priſoner pretended, that he had an Authority to ſell an Eſtate, &c. and farther he depoſed, that he got ten Guineas of the Priſoner to defray his Charges until they could put their Deſigns in Execution; which was to be done as ſoon as the Soldiers, who were then encamped in Hide-Park, ſhould break up.

† This was the overt Act laid in *Eſſex*.

That theſe Conſultations were carried on between the Priſoner and this Witneſs for a whole Month; yet the Priſoner never told him who was to be the General Officer, tho' he went with him to the Lord North and Grey's Houſe, but not a Word ſpoken there of their Scheme, where this Witneſs was introduced by the Priſoner, and received very kindly.

The next Witneſs produced againſt the Priſoner was a Soldier, (viz.) Serjeant Plunkett, who depoſed, that in July laſt, he met the Priſoner in Lincolns Inn-Fields, who there told him of this Scheme, which was then in Agitation to bring in the Pretender, and if he (this Witneſs) could procure ſome Soldiers who were then disbanded, to liſt themſelves in the Pretender's Service, then they ſhould be able to regulate the Mob upon any Inſurrection, and told him, that the Lord N. and G was to be their General; and that he would head the Inſurrection, and that the Priſoner then gave him (this Witneſs) half a Crown, and promiſed to ſend him more Money to liſt Men; that afterwards he received half a Guinea of one Jefferies a Non-juring Parſon, who told him (this Witneſs) that Mr. Layer was in the Country, and had ſent that Money to him; that in a little Time afterwards he had a Letter left at his Lodging by the ſaid Parſon, that Mr. Layer was come to Town; and thereupon this Witneſs went to him at the Caſtle-Tavern in Drury-Lane, where he the ſaid Layer told him, that he had ſent a whole Guinea by the Parſon, and wondered that he had received but half, and no more, and then he the Priſoner told this Witneſs the whole Deſign; and that ſome of the greateſt Men

Serjeant *Plunkett*.

Men in the Kingdom would come into the Scheme; and tho' he (this Witness) acknowledged that he could neither write or read, yet he remembered the Contents of the Letter which he had received three Months since, and which one of his Comrades did read to him.

Mrs. Mason. The next Witness was Mrs. Mason, who deposed that the Prisoner left a Bundle of Papers with her for safe Custody, which was sealed with an Head; that the Bundle so left with her was not opened till the Messenger seised it at her Lodging; and that the Bundle now produced in Court is the same which was left with her by the Prisoner, she having marked it in a particular Manner; and the Messenger deposed that it is the same Bundle he seised at her Lodging.

Messengers. Then the Messengers who apprehended the Prisoner, deposed that there were 2 Fuzees, 2 Case of Pistols, 2 Swords, 2 Muskets, and about 40 or 50 Cartages of Powder and Bullets in his the Prisoner's House, made ready for any Enterprise; and one Colonel Huske deposed, that the Fuzees had such wide Bores, that they would swallow a Musket-Ball, and serve very well for that Purpose.

Mr. Squire. Then Mr. Squire the Messenger, and others made Oath of the Manner of the Prisoner's Escape from him out of his (the Messenger's) House, and of his being retaken in Saint George's Field's in Southwark.

Mrs. Mason. Mrs. Mason farther deposed, that she had received several Letters by the Order of the Prisoner, which were directed to one Mr. Fountaine, which Letters were delivered by her to the Prisoner, and opened and read by him; and she being now asked whether she could read, she replyed she could not, but that her Landlady told her to whom those Letters were directed.

Mr. D'Oyley. Then one Mr. D'Oyley deposed, that some Papers which were in that Bundle were as he believed of the Prisoner's Hand-Writing; for that he this Witness was acquainted with his Hand, he being his Clerk about fourteen Years since, and that he had received a Letter from the Prisoner about five Years past, which he believed was written by him.

Then the Papers were produced to be read, which was opposed by the Counsel for the Prisoner, because Similitude of Hands was no Evidence, and some Cases were cited to prove that Matter.

Paper is found in his Custody, tho' not written by him, may be read. But this was over-ruled by the Court, who were of Opinion, that if these Papers were not written by the Prisoner, yet being found in his Custody, they ought to be read, and so it was resolved in the Lord Preston's Case.

Then the Papers were delivered to the Clerk of the Crown, and he read a Scheme conſiſting of fourteen Articles, how to ſurpriſe the Tower, how to provide Arms where to rendezvous, and ſeveral other Articles, &c. then he read ten Notes ſigned by the Pretender himſelf Ja. Rex, and thoſe were to raiſe Money for this Undertaking.

Then ſeveral Letters were read, all written by Sir William Ellis who is Secretary to the Pretender, and ſubſcribed Euſtace Jones, and directed to Mr. Fountaine, which Letters were deciphered by ſome other Papers found in this Bundle, (viz.) That Paragraph to provide able Workmen, was explained to provide able Soldiers, and that Paragraph, (viz.) The ableſt Hands of Barbara Smith, was explained The Army, that Euſtace Jones, is Sir William Ellis, and Mr. Atkins is the Pretender, that Mr. Burford is the Earl of Or--y, and Mr. Simonds is the Lord N. and G--y.

Then Mr. Stanian and Mr. Delehay, who were preſent when the Priſoner was examined before the Council at the Cockpit, offered to give Evidence of the Priſoner's Confeſſion there, but this was oppoſed by his Counſel, for that he had not ſigned any Confeſſion, and probably ſome unguarded Words might drop from him at that Time, which might amount to a Crime, if given in Evidence. Mr. Stanian. No Confeſſion ſigned.

Thereupon the Court declared, That it was no Evidence, but that the Witneſſes ſhould be examined as to what he confeſſed there as a corroborating Circumſtance of the Evidence already given; ſo thoſe Witneſſes being ſworn, depoſed that the Priſoner confeſſed he had been at Rome, and that he was kindly received at the Pretender's Court, and that he prayed to have Credentials to his Friends in England, which was denied; but that he obtained Leave that he (the Pretender) and his Spouſe would ſtand Godfather and Godmother to his (the Priſoner's) Child; and that after he returned into England, he applyed himſelf to the Earl of Or—y to ſtand Proxy for the Pretender, which he refuſed, then he made Application to the Lord N— and G—y who with the late Dutcheſs of Or—d, ſtood Proxies.

They farther depoſed, That being asked what he knew of the Pretender's Declaration, he anſwered he only knew ſome Heads of it; then a Woman was produced, who depoſed ſhe ſaw the Priſoner at Rome in July laſt was Twelvemonth, and that he was kindly received at the Pretender's Court.

The Priſoner's Defence.

This being the Subſtance of the Evidence againſt the Priſoner, he now made his Defence; and firſt the Lord North and Grey ſaid, that he never ſaw Stephen Lynch, but only when he came to his Houſe with the now Priſoner, where he ſtaid one Night, and no longer, and that he found by his Diſcourſe, he the ſaid Lynch was a ſcandalous Fellow, and coming afterwards to his Houſe when the Priſoner was taken, he was forbid to come in.

There were ſeveral other Witneſſes who gave an infamous Character of Lynch, Plunkett, and Maſon, (viz.) That they would ſay and ſwear any Thing, and that they would hang a Man for Two-Pence, and two of the Witneſſes for the Priſoner ſwore poſitively, that Lynch told them that he had got ſome Money from the Baſtard-Daughter of one of the firſt Men in England; another Witneſs depoſed, that Lynch told him, that he was unfortunately brought in to impeach the Priſoner, and that he had rather fight any ſix Men in London than do it; but that being engaged in it, he muſt go through, and that he had nothing to ſay againſt any Perſon, but againſt the Priſoner, and nothing againſt him but Talk; and another Witneſs depoſed, that Plunkett told her that the Money he received of the Priſoner was rather for Charity, than for any Service done to him formerly, and that he (Plunkett) could hardly make the Priſoner remember their former Acquaintance.

Then two Witneſſes were produced, who depoſed that the Papers which were ſworn by Mr. D'Oyley to be the Priſoner's Hand-Writing were not ſo; then Mr. Paxton produced a Paper found in the Bundle, which the Priſoner's Witneſſes owned to be his Hand-Writing, and this was compared with the other Papers which they had ſworn not to be of his Hand-Writing; whereupon the Priſoner obſerved to the Jury, that Similitude of Hands was a very weak Evidence, and ſaid if ſuch Evidence, and ſuch Witneſſes ſhould be allowed, it was impoſſible for any Man to be ſafe.

Sir Philip York.

Then the Solicitor General replyed, ſetting forth the Greatneſs of the Offence, and the Plainneſs of the Proof, and made ſeveral Remarks on the Evidence on both Sides, and ſaid that the Indictment was proved beyond Contradiction; and that the Witneſſes produced to give a Character of Lynch, &c. wanted Witneſſes to their own Characters, and that one of them, (viz. James Darcy) had ſworn he knew the Priſoner

here last Winter, when he did not come into England till last April.

That these Witnesses seemed to be People raked out of the Mint for a certain Purpose, but that the Witnesses for the King were Persons of Credit, and to prove them so, several credible Persons were called; the first was a Vintner, who deposed that he had known Lynch about four Months, in all which Time he was frequently at his (the Vintner's) House, and had behaved himself very honestly; and being asked whether Lynch owed him any Money, he replied, that he did, (viz.) 8l. 15s. 6d. which he paid not long since; there were likewise several Officers called to Plunket's Character.

Then the Chief Justice summoned up the Evidence on both Sides, and concluded with directing the Jury, that if they did believe there was an Overt-Act of Treason in the County of Essex, and that it was proved by Lynch, and confirmed by the Confession of the Prisoner; and if there was any Overt-Act in another * County, as his listing or employing any to list or engage Men in the Pretender's Service, then they should find the Prisoner guilty; and they being gone from the Bar, returned in the Space of half an Hour, and brought in their Verdict Guilty. Curia. The Verdict.

The Prisoner was then remanded to the Tower, and ordered to be brought again to the Bar on the Tuesday following, being the 27th Day of November, which was done; and then his Counsel moved again that his Irons might be struck off, which was likewise done; and the Court directed, that if they had any Thing to offer in Arrest of Judgment, this was the proper Time, and they should be heard.

Thereupon they moved that the Venire facias for summoning the Jury might be read, which was opposed by the King's Counsel as a Thing without Precedent; therefore if it should be now allowed, it might be a Precedent hereafter, not that they feared to have it read, but would not make a Precedent to give the Courts any Trouble both now and hereafter, and the rather, because what was now desired did not concern the Merits of the Cause, but was a collateral Point, and of no great Weight.

And the Court said they would not deny the Prisoner any Thing to which he was entitled by Law, and which might do him any Service in his present Circumstances; but that if what was now desired was never yet granted to the greatest Persons under the like Misfortunes, there could be no Reason to grant it to him. The *Venire facias* not allowed to be read.

* On an Indictment for High Treason in conspiring the Death of the King, if several Overt-Acts are laid, and some are proved by one Witness to be done in the County where the Party is indicted; and others are proved by another Witness to have been committed in a different County, that Evidence is sufficient to maintain the Indictment; they are two Witnesses of the same Species of Treason within the Meaning of the Law. *Keyling* 51. *Stafford's Trial. Five Jesuits Trial.*

'Tis true, the Indictment is a Thing on which the Merits of the Cauſe depend, and therefore the Court admitted it to be read to the Priſoner, but not the Venire facias, for that was never yet allowed.

The Objection to it.

The Objection to it, if it had been read, was, that 'tis returnable Octab. Martini, and the Priſoner not being tried on that Day, in ſuch Caſe, if 'tis not continued to the Day of Trial, they are out of Court, and ſo this Jury had no more Authority to try the Priſoner than thoſe who were never returned on the Panel, becauſe the Diſcontinuance makes the Trial erroneous, for where-ever there is a Diſcontinuance of any Return, the whole Proceedings are wrong.

33 H. 6. 45. Rookwood's *Caſe*. Yelv. 204. 2 Cro. 257, 284. Roll's Abr. 822.

Then the Court asked the Clerk of the Crown how the Practice was in ſuch Caſes; who anſwered, that it was as in the preſent Caſe, and that he never ſaw a Venire facias continued, becauſe the Jury are always ſuppoſed to be in Court till the four Days are paſt; and there never was any Continuance within the four Days.

To which it was anſwered by the Counſel for the Priſoner, that it might be ſo in Civil or Criminal Caſes, but not in Capital Cauſes, becauſe in ſuch the Law requires the utmoſt Certainty.

Curia.

And the Court was of Opinion, that if this was a good Objection, then many Proceedings in the like Caſes would be ſet aſide.

Intention to levy War is an Overt-Act of a Deſign to kill the King.

Then the Priſoner obſerved, that all the Proof againſt him at the Trial was a Deſign to levy War; but that it never was actually levied, and that a Deſign or Intention to levy War was not Treaſon; 'tis true, an Intention to kill the King is Treaſon, if proved by ſome Overt-Act; and here the Indictment is for a Deſign to kill the King; and the Overt-Act which they would apply to it, is a Deſign to levy War, which he ſaid was not an Overt-Act of his Deſign to kill the King.

But the Court was not of that Opinion, this very Point being ſettled in Francia's Caſe, where an Intention to levy War was adjudged to be an Overt-Act of a Deſign to kill the King.

To which it was anſwered by the Counſel for the Priſoner, that in Francia's Caſe it was only argued, Whether an Intention to levy War ſhould be given in Evidence as an Overt-Act of an Intention to kill the King, which is not the preſent Caſe, becauſe now that very Matter is moved in Arreſt of Judgment, where all the Streſs muſt be laid upon it that poſſibly may be laid; which was not requiſite in Francia's Caſe, becauſe he was acquitted; but this Objection was over-ruled.

Overt-Act, where well laid.

The next Thing in Arreſt of Judgment was, that the Overt-Act in Eſſex was not well laid in this Indictment, for it was, that he (the Priſoner) propulavit quoddam proditorium ſcriptum purportan. & continen. &c. When the very

Words, and not the Purport of them, ought to be laid in the Indictment.

But the Counsel for the King argued, that in Capital Cases 'tis sufficient to lay the Purport of the Words in the Indictment; and that it was the Opinion of the late Chief Justice Holt, that in all Cases for scandalous Words, it was the safest Way to lay the Purport of them in the Action, because then the special Matter might be given in Evidence. Purport.

'Tis true, in Criminal Cases, the very Words ought to be laid in the Indictment, but not in Capital Cases, for suppose a Man should get upon Charing-Cross and read a Declaration for the Pretender, this would be Treason, tho' the very Words could not be laid in the Indictment; all which was admitted by the Counsel for the Prisoner, because the Proclaiming the Pretender would be High Treason; but in the present Case, the Prisoner only gave a Paper to Lynch to read, which is not a Publication of that Paper.

This Paper is a scandalous and treasonable Libel, which the Counsel for the Prisoner at his Trial called a Ballad, and that it would amount to no higher a Crime than to the Publishing a Libel, for which they ought to have been reproved at that Time, but it was passed over, because it should not be said, but that they had all Manner of Indulgence; and now being asked, Whether they had any Thing more to say in Arrest of Judgment; they replied they had not. Curia.

Then the Prisoner said he had several Accounts to make up with several Persons, and particularly with the Lord Londonderry, and that he hoped he might have a little Time allowed for that Purpose, because he would do Justice to all Men, and that he had a greater Account to give to his Maker, and hoped that he might have some reasonable Time allowed in that Respect, and then if the King was not pleased to continue his Life, he would convince the World that he dared to die like a Gentleman, and to appear before that just Judicature, where he hoped to have a double Portion of that Justice which had been denied to him here.

Then the Chief Justice gave Sentence thus, (viz.) Christopher Layer, you are convicted of High Treason, and on a very plain Proof; you had Counsel of your own Chooſing, and a Jury of your own Admitting, for you excepted against 34 only; the Facts which were proved against you were, your frequent Corresponding with the Pretender, and a treasonable Scheme of your own Hand-writing; your Confession before the Counsel shews, that the Tower of London was to be seised, and also the Bank of England, the General of the Army, and

and other the King's Friends, and likewise his Royal Person, and all the Royal Family, and that a Declaration was to be sent to alarm all Parts of the Kingdom; and all this was to be done to a King who never offered the least Wrong to any of his Subjects, but who takes all possible Care to maintain the Laws, and to preserve the Rights and Liberties of the People, which Laws he makes the Measure of his Government; and that you have endeavoured to set a Popish Pretender on the Throne, who would introduce despotick and arbitrary Power, and all this done by you who are a Professor of the Law, and who could not be a Stranger to the Happiness of our present Constitution.

The Judgment.

But now you stand for Judgment, which is, That you be carried from hence to the Place from whence you came, and from thence you shall be drawn to the Place of Execution, and there to hang, but not till you are dead, but to be cut down alive, and your Entrails cut out, and burnt before you, and your Head to be cut off, and your Body divided into Quarters, and both your Head and Quarters to be disposed as his Majesty shall think fit.

Then the Prisoner desired, That his Wife and Sister might have Leave to come to him, and that Mr. Morgan and Mr. Jones, two Clergymen, might be admitted to him; but Mr. Jones not being in Town, he chose another, and had a Rule for that Purpose.

Executed in one County tho' the Fact was done in another.

But on Wednesday 28 Novemb. the Attorney and Solicitor General moved for a Rule for his Execution, and that the Court would appoint a Time and Place for that Purpose; and said, that the chief Design of executing such Criminals was to be an Example to others not to offend in the like Manner, and to deter them from committing Treason, and therefore they moved that the Execution might be in Middlesex, tho' the Fact was done in Essex, and said, that there were many Precedents for executing Criminals in such Places as this Court should think proper.

Thereupon the Court asked the Clerk of the Crown if he knew any such Precedents, who replied, that one Fitzpatrick, who was an Associate with the Lord Audley, was executed in Middlesex for a Fact committed in Wiltshire, and two other late Precedents of the same Nature.

So a Rule was made to the Lieutenant of the Tower, to deliver the Prisoner to the Sheriffs of London and Middlesex; and another Rule to the said Sheriffs to execute him on Monday December the 12th, at Tyburn.

Then the King's Counsel moved the Court to alter the Rule made the Day before, for Mr. Morgan, the Clergyman,

to attend the Prisoner, for that he was taken into Custody upon Suspicion of Treason; and had given Bond to appear in Court this Day.

The Court answered, that any Clergyman should be admitted to the Prisoner, who was a Person of known Honesty, Integrity, and Learning, but not such who might harden him in his Iniquity in his last Moments; so two more Clergymen were joined in the Rule, and the other two struck out.

Afterwards, and on that very Day before he was to be executed, he had a Reprieve, and there being some Opinions, that he could not be executed by Virtue of any Warrant signed by the King; but that a new Rule must be made in the Court of King's Bench for his Execution, he was accordingly brought to the Bar in Hillary-Term following, and a Rule was made for his Execution on the 27th of March; but before that Time he procured another Reprieve, and afterwards another Rule was made to execute him on the 17th Day of May following, which was done accordingly. Reprieve.

The King *versus* Seymour Richmond.

AN Attachment was granted last Term against the Defendant Richmond, nisi causa, &c. for that he being Town-Clerk of Wallingford, had attached so much Meal in the Market there in Sacks, and had sold the same under Colour of the said Attachment, when the Owner would have given an Appearance to the Suit for which his Goods were thus attached; and upon Complaint made by the said Owner to the Mayor and Burgesses there, he the said Defendant was ordered to deliver the Meal to the Owner, upon giving an Appearance as aforesaid; but the Defendant refused to deliver the Meal, and said, that the Owner should never have his Meal again. Attachment against an Officer of an inferior Court for Oppression.

And now he shewed this Cause why an Attachment should not go against him, (viz.) he made an Affidavit, that he was Town-Clerk of that Borough, and that when he made out the Order to attach the Meal, he thought it a good Order; and that if the Mayor and Burgesses made any Order for the Defendant to deliver the Meal to the Owner, such Order was only verbal, and not in Writing, and that a verbal Order could not supersede one in Writing, and that if he had offered any Contempt to such verbal Order, he ought to be punished

punished there, where the supposed Offence was done, and not by Attachment.

To which it was answered, that where an Officer of an inferior Court abuseth the Process of that Court, to the Oppression of any Person, he may be punished by this Court; and that the Defendant having issued out an Attachment as the very first Process, 'tis altogether irregular; and then afterwards to make Use of it as an Execution, is still worse, and an apparent Oppression; and having sold the Meal by Virtue of that Attachment, contrary to the express Order of the Mayor, and his Declaring that the Owner should never have it again, shews he had a Design to oppress him.

'Tis true, he swears that he had only a verbal Order to deliver the Meal; but yet that can be no Excuse to him, because he is the very Person (being the Town-Clerk) who should have entered that Order in Writing.

Curia. The Rule is for an Attachment nisi causa, &c. and the Ground of that Rule is for oppressing a Stranger, and if this is not denied, (as 'tis not by the Affidavit) then the Defendant is guilty of this Oppression; so the Rule was made absolute.

The King *versus The Prisoners in the* Tower.

* 31 Car. 2. cap. 2. *Habeas Corpus* Act suspended.

BY the Habeas Corpus * Act, 'tis provided, that Persons committed for Treason or Felony specially expressed in the Warrant, shall upon Prayer in open Court, in the first Week of the next Term, be brought to their Trial, and if not indicted the next Term, then upon Motion on the last Day of that Term, they shall be bailed, unless it appear on Oath, that the King's Witnesses are not ready; and if on such Prayer they are not indicted or tried the second Term after Commitment, they shall be discharged; and the Judges refusing to grant an *Habeas Corpus*, shall forfeit 500 *l.* and the Officer refusing to obey it 100 *l.*

This Act was now by another Act of Parliament suspended for a Time, and one Kelly a Prisoner in the Tower for High Treason moved for Leave to enter his Prayer pursuant to the Habeas Corpus Act, and the same Motion was made in Behalf of the Lord Orrery, and the Lord North and Grey, and the Case of Bernardi was mentioned to shew that this was a reasonable Motion, because they might be entitled to the Benefit of the Act, if it should ever be revived; for Bernardi was held to be out of the Act, because he did not enter his Prayer the first

Week of the Term after his Commitment, apprehending that he was not obliged to do it, because the Act was then suspended as 'tis now.

The like Motion was made in Behalf of the Bishop of Rochester, and it was farther urged by his Counsel, that the Habeas Corpus Act was not suspended, because the Words of the Act of Suspension were, That no Judge or Justices shall Bail or Try, *&c.* without Leave from the King, signed by six Privy Counsellors; and this Court is not restrained by these Words Judges or Justices, for the Power and Jurisdiction thereof cannot be taken away, but by plain and positive Words expressing the same; and it was said, that notwithstanding this Act of Suspension, the Lord Chancellor for the Time Being might bail such Prisoners, for he was not restrained by these Words Judge or Justice, *&c.* 4 Inst. 71. Salk. 103.

That this Court by its original Jurisdiction is invested with an ordinary and extraordinary Power, which cannot be taken away by Implication in any Statute; it hath likewise a compulsary Power by Virtue of the Habeas Corpus Act, which Commands this Court to bail Persons, &c. which Power still subsists, notwithstanding the Suspension; for these Words, no Judge or Justice shall Bail or Try, shall not include so high a Judicature as this Court; and this is agreeable to the usual Construction of other Acts of Parliament; therefore that Statute which deprives a Man of his Liberty shall not have so favourable a Construction as other Acts of Parliament.

And to induce the Court to be of this Opinion, some late Cases were mentioned where Persons were bailed during former Suspensions of this Act, (viz.) The Lord Aylesbury, Fitzpatrick, and Sir William Windham.

Besides, there is sufficient Matter to satisfy the Words of the suspending Act without extending them to the Jurisdiction of this Court; and that is by restraining the Justices of Oyer and Terminer, and Gaol-Delivery, and Justices of Nisi prius from bailing or trying any Man committed for Treason, so that it shall not by any Construction relate to this Court.

On the other Side it was argued, that if this Motion should be granted by the discretionary Power of this Court, then some extraordinary Circumstance ought to be shewed to induce the Court to grant it, in a Case of High Treason; but there is no Pretence to such Matter, they only rely upon the Words in the Act it self, as not restraining this Court to bail Persons; the Words being, that no Judge or Justice, *&c.* shall Bail, &c. which Words (as they would have them) Econtra.

do not extend to this Court; but certainly this must be a Mistake, because before the Act of Suspension was made, no Judge or Justice could bail for High Treason; therefore those Words must relate to this Court, which is composed of Judges.

The Power of the Court of *B. R.* is restrained.

Now if this Court is not restrained, the Act of Suspension will be illuded, for some Judicature was intended to be restrained; and if not this Court, then it can be no other, because a Judge or Justice before this Act was made could not bail (as hath been observed) for High Treason; so that it was made purposely to restrain this Court.

The Lord Aylesbury's Case is not parallel to this Case, because the Habeas Corpus was suspended only to him and them who were then committed on Suspicion of Treason, or treasonable Practices, but not to them who were committed expresly for High Treason.

So that it appears by a very plain Indication, that the Intent of the Legislature was to restrain this Court, and if so, 'tis as good as if restrained by positive Words.

Now that it was so intended, it appears by the very Words of the Act of Suspension, (viz.) No Judge or Justice shall Bail, &c. which Words restrain this Court, and also Justices of Oyer and Terminer; for if the Judges are restrained, the Court must be so too, because 'tis composed of Judges; and my Lord Coke tells us, that if the King sate here in Person, Justice must be administered by the Judges.

'Tis to be observed, that this Act is penned in the most general Words that could be thought on, and that the Lawmakers could have no other Intention than to restrain the Judges from bailing either in or out of Court; and this seems to be the plainest Construction of the Act; therefore if this Court can neither bail the Prisoners, or try them, it will be to no Purpose to grant an Habeas Corpus; so it was denied, and the rather because it was denied in Layer's Case; for the Court would not try him till they had an Order from the King, as the Act directs.

The King *versus* Street *and* Stroud.

Mandamus to the old Churchwardens, to deliver the Parish-Books, &c. denied.

UPON a Motion for a Mandamus to the old Churchwardens of the Parish of C. to deliver the Parish-Books to the new Churchwardens, &c. a Rule was made for them to shew Cause on such a Day why a Mandamus

ſhould not go; at which Day it was ſhewed for Cauſe, that this was a new Motion, and the like had never been made in this Court, and that the late Chief Juſtice Holt had denied to grant it to a Steward of a Court-Baron.

But that which was now inſiſted on was, that the old Church-wardens had a Right to keep the Pariſh-Books, ſo the Rule was diſcharged, for a Conteſt between Pariſh-Officers, which of them had a Right to keep thoſe Books, ought to be tried at Law upon a feigned Iſſue.

The King *verſus The Mayor and Aldermen of* Carliſle.

Mandamus to the Mayor, &c. of *Carliſle.*

MAndamus to the Mayor, Aldermen and Common Council of Carliſle, to reſtore one Simpſon to his Freedom of that City, of which he had been deprived by them; the Return was, that he the ſaid Simpſon and one * Hutchiſon, intending to ſubvert the good Government of this City, gave one Harriſon, a Freeman thereof, ſixty Guineas as a Bribe for his Vote and Intereſt at the Election of a Mayor there, and promiſed that they would get a Place for his Son in the Cuſtom-houſe; that this City was incorporated by the Charter 3 Car. 1. by Virtue whereof the Mayor, &c. hath Power to remove, &c. for any lawful Cauſe, provided the greater Part of the Common Council agreed to ſuch Removal; that he the ſaid Harriſon had exhibited an Information in Writing of this Matter ad effectum ſequen. &c. in open Court, before the Mayor and nine Common Council-Men, who are the greater Number of them, the Whole conſiſting of a Mayor and ſeventeen Common Council-Men, and thereupon Simpſon was ſummoned to appear before them; who, after his Appearance, refuſed to anſwer certain Articles in Writing exhibited againſt him on this Information; whereupon this Court of Mayor and Common Council-Men adjourned from Time to Time three whole Days one after another, expecting that he would comply before they diſfranchiſed him; but he not complying, was diſfranchiſed.

* *See* Hutchiſon's *Caſe* poſtea. *ante* 19.

For Simpſon.

It was argued for Simpſon, that no good Cauſe of Diſfranchiſement was returned, becauſe the Charge on which the Merits of this Cauſe depend is Bribery at the Election of a Mayor; now Bribery is an Offence at Common Law, by which Law the Offender may be puniſhed, but 'tis againſt Magna Charta to deprive a Man of his Freedom before he is convicted of a Crime by the ordinary Methods which that

Law prescribes; for what Security can any Man have from the Insults of Power, if he may be removed from his Freedom before Conviction, or before a Trial by the Laws of his Country, to which every Man hath an equal Right; now if Simpson had been charged with Perjury or Forgery, which are Crimes of a worse Nature than Bribery, yet he could not be removed before Conviction.

And this Inconvenience would follow, if such a Removal should be allowed, (viz.) If the Court of King's Bench should be of Opinion, that the Removal is good, and the Person should be afterwards tried for Bribery, (which no Man will deny but he may), and upon such Trial he should be acquitted, then there would be a Contrariety of Opinions and Clashing of Judgments, which should be now foreseen so as to be avoided.

'Tis true, these Persons are incorporated by Charter, but the King could not give them a greater Power than he had to give, for he himself cannot deprive a Man of his Freehold before Conviction, therefore the Charter giving them a Power to remove, &c. must be intended for a Cause not cognisable at Common Law, (viz.) By doing any Thing in the Corporation contrary to his Office, or by not doing his Office, as a Justice of Peace not attending the Sessions, or an Officer of the Corporation being a common Drunkard, or guilty of any Misdemeanor against the Duty of his Office, and which is no Crime at Common Law; and there is a very plain Difference between doing an unlawful Act, and not doing the Duty of his Office, for the one is a Crime, the other is only a Contempt.

But admitting that Simpson denied to answer the Interrogatories, yet that cannot be a sufficient Cause to disfranchise him; the rather, because 'tis not a Matter regularly before the Court; for they ought to have returned the Information made by Harrison, and the Articles specially, and not * ad talem effectum, as was done in this Return.

* *See* The King *v.* Bear. The Queen *v.* Dr. Bates. The Queen *v.* Mayor of Glouc.

Admitting likewise, that what is returned is a publick Offence, yet if the Corporation hath received no Damage by it, they cannot remove the Offender before Conviction; now it doth not appear by this Return, that the Body corporate is in the least damnified; 'tis true, the Return is, that Simpson intended to subvert the Government of this Corporation; but a bare Intention shall not be prejudicial to him, unless he had done some Act in Pursuance of such Intention; and no Man can tell whether Bribery at an Election to pro-

mote a particular Man to be Mayor, would be prejudicial to the Corporation, or not.

But admitting it to be an Offence, and prejudicial to the Corporation, yet the Person bribing ought not to be disfranchised, but rather to be indicted upon the Statute of * Westm. 1. by which 'tis enacted, That none shall disturb any by Force, Malice, or Menaces, to make free Election, in Pain of great Forfeiture. * 2 Inst. 169.

In Answer to the chief Objection, that Simpson ought not to be removed from his Freehold before Conviction, because the Crime for which he was charged is an Offence at Common Law; this was admitted to be true, but 'tis a Crime relative to the Duty of his Office in the Corporation, and therefore he may be removed before Conviction; 'tis an Offence which will destroy the very Being of this Corporation; 'tis contrary to his Oath of Fidelity when he was first admitted to his Freedom. Econtra.

There are some Cases where Men have been removed for Offences punishable at Law, even before any Conviction; as for Instance; a Man was removed for a † Riot in the Council-Chamber, which is an Offence punishable at Common Law, yet the Offender was removed before Conviction; and so was * Serjeant Whitacre, who having Notice, refused to attend at the Sessions of the Peace, for which Cause he was turned out of the Recordership of the Borough of Ipswich before Conviction. Removal before Conviction. † Style 477. The King *ver.* Yates. * 2 Salk. 434.

The like is often done in the Colleges of both our Universities; and Baggs's Case, which is the Magna Charta of all Cases of this Nature, warrants this Opinion, and especially since the Statute 9 Annæ, which gives a Traverse to the Return of a Mandamus, and which Simpson having refused, he hath thereby implicitly admitted the Crime for which he is charged; because, if it was false, he might have traversed the Return, and therefore he ought not to be favoured.

And as to his Removal before Conviction, this is a Condition annexed to his Freedom in this Corporation, which he took, subject to be removed for any reasonable Cause; and his Removal is the more just, because he had all reasonable Opportunities allowed him to defend himself if he could.

Upon the whole Matter, a Return of a Mandamus needs not so much Certainty as an Information or Indictment; because, if 'tis true, no Punishment ought to be inflicted on that Account.

The

The Reply.

The Objection, That they ſhould have ſet forth in the Return, the Information of Harriſon, in hæc verba, and not ad talem effectum, is not anſwered; now the Reaſon why that Information ſhould be ſet forth to a Certainty is, becauſe 'tis the very Ground of the Charge by which Simpſon was removed; and 'tis not ſufficient to ſay, that ſo much Certainty is not required in this Caſe as in an Indictment, and to alledge for a Reaſon, that no Puniſhment is to be inflicted upon that Account, becauſe 'tis a great Puniſhment for a Man to loſe his Freehold.

Beſides, they have not ſet forth in this Return, that Simpſon had done any Thing prejudicial to this Corporation, and as to Serjeant Whitacre's Caſe, 'tis no Manner of Authority in the preſent Caſe; 'tis true, he was removed before Conviction, but it was for not attending the Seſſions to direct the Corporation in Proceedings to adminiſter Juſtice, which was an Offence done to the Corporation, and conſequently a Forfeiture of his Office of Recorder.

Chief Juſt.

By the Return of this Mandamus it appears, that Simpſon was duly ſummoned, and that they who removed him had an Authority ſo to do, but that it muſt be for a lawful Cauſe, which did not appear by this Return; for the Information and the Articles grounded thereon are not ſufficiently ſet forth to inform the Court of the Crime, being only returned ad effectum ſequen'; now where Words in an Indictment for a Libel were ſet forth ad effectum ſequen'; that was held inſufficient in the Caſe of The * King *verſus* Bear; and there is no Reaſon why an Indictment ſhould be more certain than the Return of a Mandamus; for in the one Caſe the Party is to be puniſhed, and ſo he is in the other, (viz.) By the Loſs of his Freedom.

Ad effectum ſequentem, not good.

* 2 Salk. 417. 5 Mod. 163. S. C.

As to the Queſtion, Whether a Man can be removed from his Freedom for a Crime puniſhable at Law before he is convicted of ſuch Crime; the * Chief Juſtice held he could not; and that in the Caſe of The King and the Mayor of Glouceſter, it was ſo adjudged in Point, that Bribery was an Offence puniſhable at Common Law; and that a juſter Trial might be had in the Courts in Weſtminſter than by a Mayor and Common Council-Men in a Corporation, who are generally corrupted, and uſe arbitrary Methods in Trials there; ſo he was of Opinion that a peremptory Mandamus ought to go.

* *Nota*; He did afterwards retract this Opinion in the Caſe of The King and the Mayor of *Tiverton*, where he held, that Bribery was a ſufficient Cauſe to remove a Man from his Office before Conviction.

But

But the other three Judges were of a contrary Opinion, their Reasons were as follow:

ſſ. 'Tis agreed on all Hands, that there was a Crime done, and it ſufficiently appears, that the Corporation ſuffered by it; for what can be a greater Injury than corrupt Members, and it ſeems very reaſonable, that where the immediate good of a Corporation is concerned, that they ſhould have Power to remove him who acts contrary to ſuch good.

That this Corporation hath ſuch a Power by the very Words of their Charter, (viz.) To remove for a lawful Cauſe, for otherwiſe thoſe Words are inſignificant; and it would be very hard if a corrupt Member could not be removed before Conviction, becauſe in the mean Time he will have a Vote in all corporate Acts which may be prejudicial to the Corporation where ſuch a Voter is guilty of ſo great a Crime as Bribery.

Then as to the Form of this Return they held it good, for the Subſtance of the Fact laid in Harriſon's Information was returned ad effectum ſequen', (viz.) ſo and ſo, &c. and therefore they denied to grant a peremptory Mandamus.

The Chamberlain of London *verſus* Lopez.

THIS was an Action of Debt for 25 l. brought by the Chamberlain of London againſt the Defendant, upon the Statute * 6 Annæ, by which an † Act of Parliament for well garbling Spices was repealed, by which Repeal a Duty ariſing by that Act, and which was Part of the Revenue of the City of London was taken away, and an Equivalent was granted to the ſaid City, by taking Money to admit Brokers to exerciſe their Office.

Brokers were inſtituted in the Room of Garblers of Spices.

* 6 Annæ cap. 16.

† 1 Jac. 1. cap. 19.

ſſ. Every Perſon who ſhall act as a Broker, or employ any Man under him to act as ſuch in the City of *London*, ſhall be admitted by the Court of Mayor and Aldermen there, and ſhall upon his Admiſſion pay to the Chamberlain of the ſaid City 40 *s.* and every Year on the 29th Day of *September* 40 *s.* more, which Money ſhall be enjoyed by the ſaid City; and every Perſon acting as a Broker, and not being admitted as aforeſaid, ſhall forfeit to the ſaid City 25 *l.* to be recovered in the Name of the Chamberlain.

The Defendant by his Plea confeſſed, that he had acted as a Broker in the City, and that he was not admitted thereunto; but farther ſets forth the Act of * general Pardon, by which the King diſcharged all manner of Offences which he might

* 7 Georgii cap. 29. What ſhall be pardoned, and what not.

might or could in any wise pardon; and averred, that this was an Offence which the King might pardon, &c. to which Plea the Plaintiff demurred, and the Defendant joined in Demurrer.

For the Defendant. Dyer 238. Cro. El. 682. 5 Rep. 49.

They who argued for the Defendant insisted, that this being an Offence of a publick Nature might be pardoned, tho' the Action for the Duty must be brought by the Subject; 'tis true the Admittance-Money is given to the City as a Recompence for taking away the Revenue of garbling Spices; but yet the Offence of not being admitted as a Broker, is pardoned; for all Amerciaments are pardoned, tho' the Subject hath a Right to them, and so are all popular Actions before they are actually commenced; therefore this Offence is pardoned with all its Consequents.

'Tis true, an Indictment would have laid for this Offence, if this Act had not been made to put it in this Method of Prosecution, but that hath not altered the Nature of the Offence; and therefore it may be pardoned.

For the Plaintiff.

The Act which entitles the City to the Forfeiture, gives it in lieu of another Part of their Revenue taken from them, and the Money which is to be paid by the Brokers is in Nature of a Rent to be received by the City for a Duty which was vested in them before, and in Recompence of a civil Right of which they were now deprived, which Recompence being confirmed by the Statute, and a Penalty given for not complying with that Law, such Penalty cannot be pardoned, especially since an Action is given by the Statute for the Recovery thereof.

3 Inst. 394.

The Reason given by my Lord Coke, why the King cannot pardon a popular Action after 'tis commenced, as to the Informer's Part, is, because an Interest is then vested; but before the Action is brought, no Interest is vested in any particular Person; and therefore the King can pardon it; which Reason will hold in this Case, because there is a Right vested in the City before this Action was brought, and before the general Act of Pardon was made, (viz.) a Right to the Duty arising by the garbling of Spices, and a Right to that Recompence which was given in lieu thereof, so that this Action is well brought, and not pardoned.

If an Action of Assault and Battery is brought, the King cannot pardon the Damages recovered in such Action; so where a Libel is exhibited in the Spiritual Court, and the Plaintiff obtains a Sentence, and Costs are taxed, the King by a general Pardon cannot discharge those Costs; and 'tis

for the same Reason that the King cannot pardon an Appeal, (viz.) because the Subject hath an Interest in that Suit.

This is a Duty given to the City of London, for and instead of another Duty taken from them by Act of Parliament, and this Forfeiture is given as a provisional Security for what they might suffer thereby; and therefore 'tis not pardonable, and as a Right vests in an Informer immediately upon bringing his Action, so in this Case in that very Instant of Time in which the Offence was done, a Right vested in the Chamberlain, which entitles him to an Action for the Forfeiture, and which the King cannot pardon; he cannot pardon an Offence against the Statute de malefactoribus in parcis, as far as any Man hath an Interest therein; 'tis true, it was held in * Biggins's Case, that the Queen might pardon the Burning in the Hand; but this seems to be the Opinion of my Lord Coke alone; and 'tis plain, that the Reason he gives doth not warrant that Judgment; for he tells us, 'tis because Burning in the Hand is no Part of the Judgment; which is certainly a Mistake, for in an Appeal (as that Case was) 'tis Part of the Judgment; besides, that Case is reported in several other Books, but the same Reason in none of them for that Judgment; therefore 'tis probable that the true Reason might be, because Burning in the Hand is a Punishment to be inflicted on a Criminal for the publick Good, in which no particular Subject hath any Right; and lastly a Pardon is properly a Release given by the King; but 'tis a general Rule, that a Right which is vested cannot be released; so Judgment was given against the Defendant, (viz.) That this Offence was not pardoned.

Curia.

2 Inst. 200.
3 Inst. 238.
* 5 Rep. 50. Moor S. C. Cro. El. S. C. Co Ent. 3. Cliffe Ent.

Blackwell *versus* Nash.

THE Plaintiff covenanted by Indenture to transfer, &c. South-Sea Stock to the Defendant, on or before the 21st Day of September, and the Defendant covenanted to pay the Plaintiff 8500l. on or before the said Day; and entered into a Bond in the Penalty of 16000l. conditioned for the Performance of the said Covenant; and now in an Action of Debt brought on the said Bond, the Breach assigned was for Non-payment of the 8500l. and the Plaintiff in his Declaration set forth all this Matter, and that pro & in consideratione præmissorum, the Defendant covenanted to pay the Money; then he set forth, that he (the Plaintiff) was ready at the Time and Place agreed on to transfer the Stock,

Of mutual Covenants and Conditions precedent.

and that then and there obtulit ſe to transfer it; and averred, that neither the Defendant or any other Perſon in his Behalf was there ready to accept it.

And upon a Demurrer to this Declaration, the Queſtion was, Whether theſe were mutual Covenants, or only a Condition precedent; for if they were mutual Covenants, then the Action is well brought, but otherwiſe if it was a Condition precedent, becauſe then the Performance of that Condition muſt be ſet forth.

And it was argued, and ſo adjudged, that theſe were mutual Covenants, the Transfer being to be made on a certain Day and Place; and though in ſome Caſes the Word Pro makes a Condition precedent, ſo that the Plaintiff is not entitled to an Action, unleſs he avers the Performance of the Condition on his Part; yet 'tis not ſo in this Caſe, for here the Word Pro makes the Covenants mutual, (viz.) The Plaintiff is to transfer Prothe Money which the Defendant is to pay Pro the Transfer; and this apparently reduces it to mutual Covenants, for which each of them hath a proper Remedy for Non-performance.

* 2 Salk. 623.

And this was compared to the Caſe of * Lancaſhire and Killingworth, (viz.) Where it was held, that where a Time and Place of doing an Act, is made certain by the Agreement of the Parties, and they both meet, he who pleads a Tender muſt alſo plead a Refuſal of the other to accept the Thing tendered; but if one of them is not there, nor any Body to repreſent him, that muſt be ſet forth by the other, and that he was there at the Time and Place, & obtulit ſe, &c.

All which was done in the preſent Caſe; therefore the Plaintiff having alledged a Tender to transfer, and that the Defendant had refuſed to accept it; this is equivalent to a Tender it ſelf.

The Plaintiff had Judgment, and upon a Writ of Error afterwards brought in the Exchequer-Chamber, that Judgment was affirmed.

Warren *verſus* Conſett.

Where *nil debet* is a good Plea, where not.

IN an Action of Debt brought by the Plaintiff in the Court of C. B. who declared upon an Indenture by which he covenanted to transfer twenty-five Shares, &c. and the Defendant covenanted, that he would receive and pay for the Tranſfer, &c. and bound himſelf in the Penalty of 2800 l. to perform the ſame, and for Non-performance thereof this Action

was brought; the Defendant pleaded Nil debet, to which Plea the Plaintiff demurred, and had Judgment in that Court for the Insufficiency of the Plea, for that Nil debet is an ill Plea to this Action; and thereupon a Writ of Error was brought in B. R. and it was argued, that this Judgment was erroneous.

First, An Objection was made to the Form of the Declaration, (viz.) That the Plaintiff had not set forth, that he had done all Things necessary for him to do, to entitle himself to this Action, for he should have alledged, that he had tendered to transfer the Shares on a certain Day, Hour and Place, and that the Defendant refused to accept them; he only shews, that he was ready to transfer them debito modo, but doth not say at what Time or Place; now where 'tis set forth as it ought to be, at a certain Time and Place, and no Person is there to receive it, the Party must shew at what Time of the Day he was at the Place, and how long he staied there.

2. Obj. Because Nil debet was adjudged no good Plea, which is erroneous, it being certainly a very good Plea; for where-ever Matter of Fact is mingled with a Specialty, or with a Record, Nil debet is a good Plea, as in Debt before Auditors, 'tis a good Plea. 21 H. 7. 14. Kelw. 153. *b.* 5 Rep. 43. 6 Rep. 44. *a.*

But on the other Side it was argued to maintain this Judgment, that Nil debet is no good Plea in this Case; and the chief Reason was, because of the Solemnity of a Deed; now here the Debt arising meerly upon the Deed, and not on any collateral Matter dehors, in such Case the Defendant should have denied the Deed, and have pleaded some other Deed to avoid it; for if he once own the Deed, 'tis then a good Debt, and therefore Nil debet is no good Plea to it; besides, 'tis a Plea which includes several Issues, and for that Reason 'tis ill. Econtra.

'Tis no good Plea to an Action of Annuity, nor to an Action of Debt on a Bond brought by an Administrator; 'tis true, 'tis a good Plea to an Action of Debt brought for Rent reserved upon a Lease for Years; but the Reason is, because the Demise is the Foundation of the Action, and the Deed is only an Evidence of the Demise, and so 'tis a good Plea to an Action of Debt brought on Penal Statutes, and to Actions of Debt brought upon Awards, or to Accounts before Auditors; and the Reason is, because these are not the Deeds of the Parties, but here the Deed of the Party himself is the very Lien, and not any Thing in Pais; and the Gist of the Action is for Payment of Money.

'Tis no good Plea to an Action on a Policy of Insurance, nor to an Action on a Bail-Bond, tho' there is something dehors to be done, to charge the Insurers and the Bail.

The Court was divided in Opinion, but seemed inclinable to reverse the Judgment. See postea Mich. 11 Geo. S. C.

Pennoire *versus* Brace.

Writ of Error by two, and one dies pending the Writ.

NOTA; It was ruled in this Case, that where a Writ of Error is brought by Two, and one of them dies pending the Writ, the Plaintiff in the original Action, by entring a Suggestion on the Roll, that one of the Plaintiffs in Error is dead, may take out Execution on the Judgment, without suing out a Scire facias, either against the Heir or Executor of the dead Person.

Flemming *versus* Parker.

Writ of Inquiry where it will lie, where not.

THE Plaintiff declared on four Counts, and the Defendant demurred to one, and pleaded to Issue as to the other Three, and the Plaintiff joined in Demurrer, and had Judgment and a Writ of Inquiry, reciting a Judgment de præmissis, and that recuperare debet damna occasione præmissorum; and now it was moved in Arrest of Judgment, that a Writ of Inquiry would not lie on this Judgment until Nolle prosequi was entered as to the other three Issues, or a Venire to try them; for then, and not before, a Writ of Inquiry might be had to inquire of the Damages upon the Judgment in Demurrer; but in this Case the Plaintiff having remitted the Damages as to the other three Issues, before the Judgment was entered on the Demurrer, it was held good; and the Master of the Office affirmed, that was the proper Method of Proceeding.

Coatsworth *versus* Shaftoe.

Costs, where they shall be paid by an Administrator.

TROVER was brought by the Plaintiff as Administrator of T. S. and in this Declaration the Plaintiff had laid the Conversion to be after the Death of the Intestate, and that Administration was granted to the Plaintiff, &c.

Upon Not guilty pleaded, the Plaintiff was nonsuited; and now the Question was, Whether he should pay Costs;

and the better Opinion was, That he ſhould pay Coſts, because the Goods came to him after the Death of the Inteſtate, and he might have declared on his own Poſſeſſion, and not as Adminiſtrator, which he had done on Purpoſe to ſhelter himſelf from Payment of Coſts. Cro. Car. 29. 6 Mod. 94. 1 Vent. 109, 110.

Cooper *verſus* Beale.

AN Ejectment was brought to recover the Poſſeſſion of the Quakers Meeting-houſe; none of them would receive the Declaration, and the Meeting-houſe was never open but on Sundays, on which Day the Delivery of a Declaration is not good; thereupon the Plaintiff took a Judgment by Confeſſion of the nominal Leſſee; and now upon a Motion that Judgment was ſet aſide, becauſe it could not be entered on the Confeſſion of the caſual Ejector, becauſe in Fact 'tis the Confeſſion of the Plaintiff himſelf. In Ejectment Judgment cannot be entered upon Confeſſion of the caſual Ejector.

Holoway *verſus* Thurſton.

IN an Action on the Caſe, &c. the Plaintiff declared, and laid his Damages to 400 l. the Defendant pleaded the Statute of Limitations, (viz.) Non Aſſumpſit infra ſex Annos; the Plaintiff replied, that he ſued out a Latitat to take the Defendant two Years before the Action brought, for 150 l. and upon a Demurrer to this Replication, it was inſiſted for the Defendant, that theſe were different Actions, for no Man would take out a Latitat for 150 l. and declare ad damnum 400 l. 'tis true, if the Plaintiff had averred it had been one and the ſame Cauſe of Action, it might have been otherwiſe; and ſo it was ruled by the Court. The Statute of Limitations pleaded.

Wright *verſus* Maſon.

UPON a Motion for an Attachment againſt the Defendant and one Purcell, an Attorney, for foul Practice, and for oppreſſing the Defendant, by threatning to take him up by a Warrant of the Chief Juſtice, and by Colour thereof getting ſome Money from him, and a Note under his Hand to pay more for not ſending him to Newgate for a Treſpaſs they pretended to be done by his Wife; a Rule was made for them to ſhew Cauſe on ſuch a Day, why an Attachment ſhould Attorney was ordered to anſwer on Interrogatories for foul Practice.

should not go against them; and upon that Day they appeared and produced several Affidavits, which were read in Court, and by which they denied the Charge, but not positively and directly; and it appearing by the Affidavits, that the Fact was done by the Wife, there was no Colour to procure the Warrant of the Chief Justice against the Husband; and it farther appearing, that the Attorney had endorsed this Note to another, on Purpose to load the Defendant with an Action, he was ordered to stand committed until he should answer Interrogatories, which were to be filed in four Days; and afterwards, in Answer to the Interrogatories, he swore off all that was charged against him, for which he was indicted, and convicted of Perjury.

Cæsar *versus* Holt & al'.

Rescous, &c. An Attachment shall not be granted before Return of the Writ.

A Rule was made for the Defendants to shew Cause on such a Day, why an Attachment should not go against them for committing a Rescous, &c. and now they shewed for Cause, that such Attachments ought not to be allowed upon Affidavits of a Rescous, because in such Case the Parties might be taken into Custody before the Writ is returned, therefore the Sheriff ought to return a Rescous before the Defendants should be prosecuted for it; and the Court was of that Opinion, (viz.) That the Sheriff ought to return the Writ, which, if false, then the Plaintiff hath an Action against him; but if the Return is true, then the Action lies against the Rescuers; therefore if an Attachment should be granted on an Affidavit of a Rescous before the Return of the Writ, the Defendant could have no Action against the Sheriff for a false Return.

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DE
Term. Sanct. Hill.

Anno 9 Georgii, 1723.

The King *versus The Mayor and Burgesses of* Tregony.

Mandamus to chuse a Mayor, &c.

UPON a Motion for a peremptory Mandamus, the Case was, that a former Mandamus was directed to the Mayor and Burgesses of Tregony in Cornwal, commanding them, (viz.) Quod eligetis & juratis Majorem, &c. secundum authoritatem vestram, &c.

It was moved for a Supersedeas to that Mandamus, for that the Writ was not good, because it was directed to the Mayor and Burgesses to elect and swear a Mayor; whereas the Power of electing is only in the Burgesses, and the Power of swearing in the Mayor alone; so that the Mayor cannot make a Return of this Writ as directed to him to elect; nor the Corporation as directed to them to swear a Mayor, so that if the Burgesses should make a Return as to the swearing Part, they would be Usurpers, and if they do not make a Return, they will be in Contempt of this Court.

Besides, 'tis incongruous for a Mandamus to be directed to swear a Mayor not yet elected; therefore it being directed to a Person who had no Power to act, it ought to be superseded, like the Case of the City of London, where such a Mandamus was directed to the Mayor and Aldermen, &c. when the Power was in the Mayor alone, and that was adjudged in this Court to be not good.

But the Court were all of Opinion in this Case, that they ought to make a Return, for the Writ commanding them, Quod eligetis & juratis secundum authoritatem vestram, it shall

shall be taken reddendo singula singulis, and to be the Return of both, &c.

Return of *Mandamus*.

Then they returned, that Tregony is a Borough incorporated by Letters Patent of King James the First, by which 'tis provided, that they proceed to an Election of a Mayor every Year, on the Tuesday next after Michaelmas Day, and that the Mayor elected at that Time shall continue Mayor until another is duly elected; and farther they return, that the Day of Election being past, they cannot obey it, and proceed to a new Election on any other Day than that very Day appointed by the Charter by which they are incorporated, unless on the Death or Amotion of the Mayor.

And now the following Objections were made both to the Writ and the Return.

Objections to it.

And first as to the Writ, that it was directed to the Mayor and Burgesses to elect and swear a Mayor, where the Power of swearing, &c. is in the Mayor alone, and tho' the Court was of Opinion, that this Writ ought not to be superseded before it was returned, because if there is a Fault, it might judicially appear before them; yet when the Fault appears upon the very Return it self, the Writ ought to be quashed.

Now there is a plain Difference between a Writ to elect, and another to swear a Man into his Office; for the Writ to elect may be directed to the whole Body corporate, of which the Mayor is the Head; but a Writ to swear the Person elected must be directed to the Mayor alone; because no other Person hath Authority to swear him; and no such Authority can be given but by special Words in the Charter; and it would be very hard if this Writ should be good, because the Execution thereof would subject the Parties to an Information for usurping an Authority where they had none.

Then as to the Return, 'tis, that they could not obey the Writ, because the Day of Election of a Mayor was lapsed, and that they could not proceed to a new Election, but upon the very Day appointed by their Charter, unless upon the Death or Amotion of the Mayor in Being.

In Answer to which it was argued, that the Day was only directory, and that there could be no Inconvenience, if they should proceed to an Election on any other Day, because the Writ of Mandamus usually goes to fill up the Body corporate, for the sake of Succession, which is a Case of Necessity.

But they who argued for the Return, said there could be no such Necessity in the present Case, because the Corporation was full; therefore there was no Necessity to elect on any

other Day than on that appointed by the Charter; beſides, if the Return is not true, it ought to have been * traverſed. * *See* Statute 9 Ann. cap.

The Court was of Opinion, that the Writ was good upon a reaſonable Conſtruction of the Words reddendo ſingula ſingulis; for 'tis directed to the Body corporate, who hath the Inheritance as to the Election of a Mayor, and likewiſe to him who hath the ſpecial Power as to the ſwearing a Mayor, it being that eligetis & juratis ſecundum authoritatem veſtram. Curia.

Now all thoſe to whom the Writ is directed, are to do ſomething, for they are all to be preſent at the Swearing a new Mayor when the Oath is adminiſtered to him, which is uſually done by the Town-Clerk, and ſo far they may be ſaid to have a Power to ſwear him, for the Mayor is preſent, and ſo are the Burgeſſes at that Time.

Then as to the Return it is likewiſe good, for though it hath been ſaid that the Day is only directory; yet 'tis clear by the Charter, that they muſt chuſe a Mayor on the very Day therein appointed; which is on Tueſday next after Michaelmas-Day every Year, and that he muſt continue Mayor till another is choſen, ſecundum formam literarum patentium; now it cannot be ſaid, that a Mayor choſen on any other Day was elected ſecundum formam literarum patentium, for which Reaſons a peremptory Mandamus was denied.

Atwood *verſus* Beach.

JUdgment was had againſt the Principal, and a Sci' fa' was brought againſt the Bail of John King, when his Name was Thomas King, and after two Nihils returned, the Bail were taken in Execution; and this Matter appearing now to the Court upon a Motion, the Counſel for the Bail prayed, that they might be diſcharged, which was accordingly done; ſed per Curiam, if the Scire facias had been returned Scire feci, they could not be diſcharged, becauſe they might have pleaded this Matter in Abatement, like the Caſe of † Day and Guilford, which was Tenant for Life, Remainder to his Iſſue in Tail, the Tenant for Life acknowledged a Statute, and died; then the Cogniſee brought a Scire facias againſt the Heir, who was the Iſſue in Tail,) and the Sheriff returned Scire feci; and thereupon Judgment was had againſt him; and being turned out of Poſſeſſion of the Lands by Virtue of that Judgment, he brought an Ejectment, &c. and it was adjudged, that he was bound by the Execution, and that he had no Remedy either by Ejectment, or by *Sci. fa.* againſt the Bail of *John*, when his Name was *Thomas*.

† 1 Lev. 44. 41. Sid. 54 S. C. Raym. 19. S. C.

Writ of Error, or Auditâ querelâ, or by any other Means, but only by Action against the Sheriff for a false Return, (if it was so, because it was his own Fault by not pleading to the Scire facias, (viz.) That he was the Issue in Tail after the Sheriff had returned him warned.

The King *versus The Mayor of* Tenterden.

Information against a Mayor, taxing Men who did not live in the Corporation.

A Rule was made for the Mayor to shew Cause why an Information should not go against him, for taxing several Persons who lived out of the Corporation to be contributory to the Building a Bridge, and other Charges within the Corporation; who shewed for Cause, that tho' the Persons thus taxed did not live within the Corporation; yet they dwelt within the Liberties thereof, and were entitled to the like Privileges of those who lived within the Corporation; one whereof was to be exempted from all Taxes in the County at large, so that 'tis reasonable they should be contributory to the Charges within the Corporation, when they had the Benefit of the Privileges thereof; besides the Tax now in Question had been paid by such Out-dwellers Time out of Mind.

Curia.

But the Court directed, that this Matter should be tried upon an Information, and that for two Reasons; the one because a single Person might not be able to contest this Matter in an Action against the whole Corporation; and the other because if a Verdict should pass for or against such single Person, it would not end the Contest which might happen against the Rest.

Hotchkis *versus* Corbett.

Prohibition to the Spiritual Court for Words upon the Custom of *London*.

LIBEL in the Spiritual Court for these Words, Thou art a Cuckoldy old Dog, call down the Bitch your Wife. And now upon a Motion for a Prohibition, the Suggestion was, that there is a Custom in London to punish Whores by carting and whipping them; and that the said Words are actionable there by the Custom of the Place, and avers, that if the Words set forth in this Libel were spoken, it was in London, in the Parish of, &c. and tho' the Plaintiff might have a Remedy at Law against the now Plaintiff in the Prohibition, for speaking the said Words; yet he had exhibited a Libel, &c. and upon this Suggestion, a Prohibition was

granted; and it was now moved for a Conſultation; for admitting theſe Words were ſpoken in London, yet they are not actionable there by the Cuſtom of the City, becauſe the Cuſtom extends only to ſuch Words which are directly defamatory, and not to ſuch which are ſo by Implication; and to prove this Matter, the Caſes in the * Margin were cited.

* Cro. Car. 339. Vent. 222. Sid. 248. 2 Lutw. 1042

The Caſe of Houblon and Milner, reported in Lutw. 1042. was for calling a Man's Wife a Common Woman; and there was the like Suggeſtion, as in this Caſe, for a Prohibition, but it was denied, and a Conſultation granted; and the Reaſon there given is, becauſe the Cuſtom of London extends only to calling a Woman Whore, and not to ſuch Words from which it may be collected ſhe is ſo.

But per Curiam, that Caſe hath been denied to be Law by this Court; and it hath been ruled, that any Words which are defamatory and puniſhable in the Spiritual Court, are triable in London by the Cuſtom there, in an Action on the Caſe, wherein Damages may be recovered; ſo in the principal Caſe the Prohibition was held good, and the Conſultation was denied.

Lowther & Ux' *verſus* Kelly.

MR. Lowther, the now Plaintiff, whilſt he was in Barbadoes, gave a Letter of Attorney to W. R. who by Virtue thereof, and of the Power therein given, made a Leaſe of an Houſe to the Defendant, rendring Rent to the ſaid W. R. in which Leaſe Kelly, the Defendant, covenanted to pay the Rent to the ſaid W. R.

Where a Stranger to a Deed or Promiſe may bring an Action.

And now in an Action of Covenant brought upon this Indenture by Lowther and his Wife, the Breach aſſigned was, for Non-payment of Rent, &c. And the Wife dying ſince the laſt Continuance, the Defendant pleaded that Matter in Abatement.

But it was inſiſted for the Plaintiff, that the Action ſurvives, by ſuggeſting the Death of the Wife upon the Roll; and this is by Virtue of the Statute * 8 & 9 Will. 3. by which 'tis enacted, That where there are two or more Plaintiffs or Defendants, and one or more of them ſhall die, *&c.* the Writ or Action ſhall not abate; but ſuch Death being ſuggeſted on the Roll, the Action ſhall proceed, and therefore this Plea in Abatement ought to be quaſhed.

* 8 & 9 W. 3. cap. 11.

See Lilly Pract. Regiſter *Tit.* Death.

But the Court would not quash it upon a Motion, therefore the Plaintiff suggested this Matter on the Roll according to the Statute, and so proceeded in the Action.

And the Question upon the Pleadings was, Whether the Plaintiff could maintain an Action of Covenant upon this Indenture; and it was argued that he could not, because he was not a Party to the Deed, but a meer Stranger to it; and the Reservation of the Rent was to a Stranger, and so was the Covenant to pay it; and such a Covenant cannot be good to one who is no Party to the Deed.

Dyer 132. Moor 819.

Therefore he who hath a Letter of Attorney to act for another, if he makes a Lease in his own Name (as was done in this Case) such Lease is void, for it should be made in the Name of him who gave the Power and Commission to act in his Behalf.

9 Rep. 77. Moor 818.

'Tis true, in a Deed-Poll there may be a Covenant in Behalf of a third Person, but not in an Indenture; therefore where there is a Covenant * between A. and B. that such a Sum of Money shall be paid to C. this is not good.

* Inst. 47. *a.* 2 Roll. Abr. 448,450,453.

So that this being a Covenant or Contract in an Indenture, no Man can take Advantage of it but he who is a Party to it.

The Master cannot have an Action against the Defendant for hiring his Servant to work with him (the Defendant) without shewing that the Contract was made with him (the Plaintiff).

2 Cro. 653.

So where the Cattle of the Master were sold by his Servant, and a Bond taken in the Servant's Name for Payment of the Money, but to the Use of the Master, and he brought the Action upon this Bond; adjudged that it would not lie, because he was no Party to the Bond, for he could not release it.

1 Lev. 235. 2 Lev. 74. 3 Lev. 138.

1 Vent. 6. Bourn *versus* Mason.

So where one Parry was indebted, both to the Plaintiff and the Defendant, and W. R. was indebted to Parry, and the Defendant promised, that in Consideration Parry would permit him to sue the said W. R. he would pay the Debt due to the Plaintiff; and upon an Action on the Case brought on this Promise, and Non Assumpsit pleaded, the Plaintiff had a Verdict, but could never get Judgment, because he was a Stranger to the Consideration; and in this Case it was laid down for a Rule, that no Person shall recover upon an Agreement, but he who is Party or Privy to the Consideration thereof.

Therefore where a Man promised the Father to pay his Daughter 40 l. at or upon her Marriage-Day, and she afterwards

wards married, and the Husband and Wife brought the Action for the 40 l. adjudged, that it would not lie, but that the Father alone, to whom the Promise was made, should bring the Action.

On the other Side it was argued in Behalf of the Plaintiff, that there are many Resolutions in parallel Cases to support this Action; as for Instance; the Case of * Dutton and Ingram, which is reported in several Books, and was thus: Econtra. * 1 Vent. 318. 2 Lev. 210. Raym. 302. T. Jones 102.

If. The Plaintiff declared, that his Father in Law being seised in Fee, &c. and being about to fell Timber to raise a Portion for his Daughter (who was the Plaintiff's Wife) the Son and Heir on whom the Lands would descend after the Death of the Father, promised the Father, that in Consideration he would forbear to cut down the Timber, he, the Son (the now Defendant) would pay the Daughter 1000 l. and for Non-payment of this Money the Action was brought by the Husband and Wife, and they had a Verdict and Judgment; but upon a Motion in Arrest of this Judgment it was objected, that this Action ought to have been brought by the Father, to whom the Promise was made; to which it was answered, that tho' the Promise was made to him, yet he was not concerned in the meritorious Act; and that there being such a Nearness of Relation between the Father and the Daughter whom the Plaintiff had married, that he, the Plaintiff, is now concerned in the very Promise made to his Father in Law.

So where the Father of a young Woman promised the Father of a young Man, that in Consideration he would settle such a Jointure on her, he (the Father) would give his Son 200 l. more upon his Marriage with the Daughter; in this Case it was adjudged, that the Son, tho' he was a Stranger to the Promise (for that was made to his Father) might bring the Action, because the meritorious Act was done by him, (viz.) The Marrying the Daughter; but in the Case of Mason and Bourn before-mentioned, the Plaintiff did nothing of any Trouble to himself, or of any Benefit to the Defendant. Lever *versus* Hayes. Moor 550.

So where the Defendant promised the Plaintiff (who was a Physician) that if he performed such a Cure, he would give him (the Physician) so much Money, and so much to his Daughter: Adjudged, that the Daughter might bring an Action for her Money, tho' she was a Stranger to the Promise, and likewise to the Consideration, because the Nearness of Relation Raym. 302.

Relation between Father and Daughter gives her the Benefit of the Consideration for her Father's Performance.

The Case was not adjudged.

Smith *versus* Jones.

Error in the Exchequer-Chamber will not lie upon a Judgment in Ejectment against the casual Ejector.

THE Practice of the Court of King's Bench is, for the Plaintiff in Ejectment to deliver a Copy of the Declaration to the Tenant in Possession, or to his Wife, with an Indorsement in English of the Substance of such Declaration, &c. and if the Tenant doth not appear in the Beginning of the next Term; then upon Affidavit made of the Delivery of the Copy of the Declaration (affixed to such Affidavit), and of Reading the Indorsement, or of acquainting the Tenant with the Contents thereof, the Court will make a Rule for the Tenant to appear and plead on a certain Day; at which Time, if he appears, he must by his Attorney file common Bail, and enter into a Rule to confess Lease, Entry, and Ouster, and leave it at a Judge's Chamber, and give Notice thereof to the Attorney for the Plaintiff, that he may proceed.

But if the Tenant in Possession doth not appear, then after the Day appointed by the Court for his Appearance, and to plead, Judgment by Default shall be entered against the casual Ejector.

Now in this Case, a Declaration in Ejectment was delivered, and a Rule made for the Tenant in Possession to appear and plead, which he did, &c. and afterwards withdrew his Plea, and confessed Judgment, which the Plaintiff entered against the casual Ejector; and now the Tenant in Possession moved by his Counsel to set aside this Judgment; the Reason was, because he might bring a Writ of Error, for no such Writ would lie on a Judgment against the casual Ejector, therefore the Judgment ought to be entered against the Tenant himself; for where-ever the Defendant is in Court, the Judgment must be entered against him and not against the casual Ejector; now here he was in Court, for he appeared and pleaded to Issue, and might come in at any Time, and confess Lease, Entry, and Ouster, &c. And if the Judgment had been entered against the Tenant, it had been better for the Plaintiff then to have it entered against the casual Ejector; because in such Case the Plaintiff will have his Costs, and will be entitled to an Action to recover the Value of the

mean Profits in Damages, which he can never recover by a Judgment againſt the caſual Ejector.

Thereupon the Court enquiring of the Maſter of the Office what was the Practice of the Court in ſuch Caſes, both he and ſeveral old Practitioners affirmed, that the Practice was to enter Judgment againſt the caſual Ejector, and that he had often denied to ſign Judgment againſt the Tenant in Poſſeſſion, unleſs he had pleaded; 'tis true, he pleaded in this Caſe, but afterwards he withdrew his Plea, and tho' he had pleaded, yet he is not a Defendant till he enters into a Rule to confeſs Leaſe, Entry and Ouſter, for then, and not before he is a compleat Defendant, and may plead to Iſſue; but whether he appears or not, yet Judgment ſhall be entered againſt the caſual Ejector; 'tis true, 'tis ſometimes entered againſt the Tenant in Poſſeſſion, but that is by Conſent of the Parties, and upon a Promiſe not to bring a Writ of Error.

The Chief Juſtice was of Opinion, that it was the Right of the Subject to give Judgment by Confeſſion, and that it was likewiſe his Right to bring a Writ of Error upon ſuch Judgment, of which Right he could not be deprived by a Rule of this Court, or by any other Court whatſoever. Curia.

Now the Intent of the Rule, for the Tenant in Poſſeſſion to appear on a certain Day, and plead, is only to bring him into Court, that when he comes in, he may confeſs Leaſe, Entry and Ouſter, but not to ſtrip him of that Right to which he is entitled by Law, as it will, if this Judgment ſhould ſtand againſt the caſual Ejector, becauſe no Writ of Error will lie in the Exchequer-Chamber upon ſuch Judgment.

But the Court was divided in Opinion; two Judges held, that the Plaintiff ſhould enter the Judgment againſt the Defendant, who was the Tenant in Poſſeſſion, and two held, that he might enter it either againſt him, or againſt the caſual Ejector; ſo it was adjourned.

The King *verſus Inhabitants of the County of* Surrey.

UPON a Motion made to diſcharge a Rule for an Information againſt the Inhabitants of the County for not repairing a Bridge, it was alledged, that the Pariſhioners of Mitcham in that County ought to repair it, which they had done Time out of Mind; 'tis true, that Pariſh had obtained a Verdict againſt the County, but it was by Surpriſe; Information againſt the County for not repairing a Bridge.

prise; for by Certificates and other Records of the Sessions, it will appear, that this Parish ought to repair this Bridge, and that they had been fined for not repairing; and that they had acquiesced under that Charge many Years.

It was insisted for the Parish, that admitting they had repaired this Bridge; yet if they were not obliged so to do, either by Prescription or Tenure, they shall not always be liable; they cannot be obliged by Prescription, because the Inhabitants of this Parish are not a Body politick, and 'tis not pretended, that they are obliged by Tenure.

To which it was answered, that an Information against the County in general was the only Way to try the Right; for tho' this Parish might not be obliged to repair the Bridge; yet some other Parish might, and since the County is prima facie to repair it, 'tis probable, that when the Information is exhibited against them, the Inhabitants of Mitcham to excuse themselves may shew who is obliged to repair it; and the Court being of that Opinion, the Rule was made absolute.

Mosse *versus* Bennet.

Where the Defendant should plead the general Issue, and give the special Matter in Evidence.

TRespass on the Case against the Defendant, for disturbing the Plaintiff in his Common; wherein he set forth, that the Defendant had covered three Acres of the Common Field with Hurdles, and had enclosed three Acres more, &c.

The Defendant pleaded, that the College of Newelme in the County of Oxford was seised in Fee of the Lands in the Declaration mentioned, and being so seised, made a Lease thereof to the Defendant for Life, and that he (the Defendant) had a Right by Prescription to have a Fair on the said Common every Year on such Days in the Year, and to have Hurdles to keep and enclose Cattle there, and a Right to so much of the Ground on the said Common as would keep the said Hurdles from Fair to Fair, and so justifies the Enclosing three Acres with Hurdles, and the Covering three Acres cum cratibus prædict', and avers it to be the same Trespass.

And upon a Demurrer to this Plea, it was objected, that it was ill and repugnant, because a Seisin in Fee was laid in the College, and an Estate for Life in the Defendant; but it was disallowed, for 'tis good reddendo singula singulis.

Thus it was objected, that the Defendant had justified the Enclosing three Acres, and the Covering three Acres, but did not say, that the Covering was in aliis tribus Acris; so that the Plaintiff having declared for a Disturbance in six Acres,

the Defendant had only juſtified in 3 Acres, which the Court held to be a Fault incurable, and the rather becauſe this being an Action on the Caſe for diſturbing the Plaintiff in the Enjoyment of his Common, the Defendant might have pleaded the general Iſſue, and have given this ſpecial Matter in Evidence.

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Term. Paſchæ,

Anno 9 Georgii, 1724.

Sir Alexander Strode *verſus* Chriſty.

Writ of Error, no *Superſedeas* unleſs the Plaintiff in Error put in Bail.

AN Action of Debt was brought in the Common Pleas upon a Contract for Payment of Money on South-Sea Articles, at the End whereof the Parties bound themſelves to each other in ſuch a Sum, for the true Performance thereof, &c. the Plaintiff had Judgment.

And now the Defendant brought a Writ of Error in the King's Bench, and the Plaintiff in the Action inſiſted, that this Writ of Error was no Superſedeas to the Execution on the original Action, unleſs the Plaintiff in Error had put in Bail according to the Statute 3 Jac.

Now as to that Matter, 'tis true, he did put in Bail, but the Plaintiff in the original Action, excepted againſt them as inſufficient; and nothing farther was done in Order to juſtify them, or to put in other Bail; and certainly he ſhall not be concluded by the giving inſufficient Bail, as they on the

other Side would have it, and compared it to the Caſe of Reeve *verſus* Pike, where after the Defendant had put in Bail, he moved that they might be diſcharged; but it was denied.

Now this being an Action of Debt founded on a Contract for Payment of Money; therefore by the very Words of the Statute, Bail is requiſite on a Writ of Error of the Judgment on ſuch Action, otherwiſe that Writ is no Superſedeas to the Execution.

'Tis requiſite on an Action of Debt on a Nomine pœnæ in a Leaſe, tho' 'tis otherwiſe in Replevin or Covenant; and the Reaſon why 'tis not required of an Executor, who brings a Writ of Error, is not, becauſe 'tis not requiſitein the original Action, but becauſe they are ſuppoſed to be ignorant of the Eſtate of the Teſtator.

Econtra. On the other Side it was argued, that this Writ of Error was a good Superſedeas, and that 'tis not neceſſary to put in Bail on ſuch a Writ, it being brought on a Judgment obtained on a Bond for * Non-performance of Covenants; for where-ever the Debt is not directly due on the Bond, or any other Agreement, but accrews upon the Non-performance of ſomething collateral to that on which the Action is founded, there no † Bail is requiſite; and this is a Bond for Payment of Money for Non-performance of Articles; 'tis true, the Bond it ſelf is included in the very Articles, but there is no material Difference between ſuch an Obligation and a Bond or Note, with a Condition for Performance of Articles; for where-ever the Action is founded on the Articles, there Bail is not requiſite, and ſo is 1 Lev. 260. Biddolph *verſus* Temple.

* 2 Bulſt. 53. Yel. 227.

† 2 Cro. 350. Cro. Car. 509.

Curia. The Statute requires, that where an Action is brought on a ſingle Bill or Bond, or Contract for Payment of Money only, that in ſuch Caſe Bail ſhall be given, which implies, that 'tis not requiſite on any other Bond or Contract; 'tis true, this is a Contract, but 'tis not for Payment of Money only, but to pay it upon Non-performance of an Agreement, and ſo not within the Proviſion of this Statute.

But tho' Bail is not requiſite to the original Action, yet it muſt be given upon a Writ of Error of a Judgment obtained in ſuch Action; as for Inſtance; If an Action ſhould be brought in B. R. for 5 l. there Bail is not required, but if Judgment is obtained in that Action, and a Writ of Error brought, certainly Bail muſt be put in.

So Judgment was given, that this Writ of Error was no Superſedeas, unleſs good Bail was put in.

The King *verſus* Wiatt.

Attachment againſt the Defendant for a Libel, &c.

UPON a Motion for an Attachment againſt the Defendant for publiſhing a Libel on the Court of King's Bench, and a Rule being made upon him to ſhew Cauſe on ſuch a Day, why it ſhould not be granted; he now moved by his Counſel to diſcharge that Rule upon an Affidavit, that his Fault was not wilful, but meerly thro' Ignorance; that he had the Libel from one Crownfield, a Printer in Cambridge; that it was in Latin, which the Defendant did not underſtand, and that he did not know who was the Author, otherwiſe than by a Letter which he received from the Printer, and which was now annexed to his Affidavit, by which Letter it appeared, that one Dr. Middleton was the Author; ſo that having ſhewed how he came by this Libel, and having told all that he knew of the Author for that Reaſon it was inſiſted in his Behalf, that the Rule ſhould be diſcharged, and that the Printer ſhould be proſecuted.

But the Rule was continued on the Defendant until he made out his Allegation againſt the Printer, who was therefore joined in the Rule, that both of them might be before the Court.

In the next Term Dr. Middleton appeared and confeſſed in Court, that he was the Author of the Book; and thereupon the Rule was diſcharged againſt the Defendant and the Printer, and the Doctor was committed till farther Conſideration of the Matter.

And within a few Days afterwards he was brought into Court, and fined 50 l. and bound to his Good Behaviour for a Year, and ſo was Dr. Colbatch the ſame Term, for the like Offence.

Goodright *verſus* Opie.

Reſiduary Legatee, where he ſhall not take by the Will.

IN Ejectment, upon Not guilty pleaded, the Jury found the Defendant Not guilty as to Part, and as to the other Part there was a ſpecial Verdict, the Subſtance whereof was thus:

ff. The Teſtator being ſeiſed in Fee of ſeveral Lands, did, in the Year 1705, deviſe all his ſaid Lands to five Perſons (naming them) and to their Heirs, as Tenants in Common, that one of the ſaid Deviſees died two Years before the Teſta-

tor, who by another Clauſe in the ſaid Will, deviſed all other his real and perſonal Eſtate not already diſpoſed unto B. and C. and to their Heirs, Executors, &c. that the Teſtator died without making Diſpoſition of the ſaid fifth Part of his Lands, other than by his Laſt Will, as aforeſaid.

See *poſtea* the Caſe of *Wright* verſ. Horne.

The Queſtion was, Whether the ſame ſhould deſcend to the Heir at Law of the Teſtator, as not being diſpoſed by him in his Life, becauſe the Deviſee died before him, or whether it ſhould paſs to B. and C. as reſiduary Legatees by the later Clauſe of the Will, as an Eſtate not before diſpoſed by the Teſtator.

Thoſe who argued for the Leſſor of the Plaintiff, who was Heir at Law, inſiſted, that this fifth Part of the Lands ſhould deſcend, becauſe it could not paſs by any Poſſibility to the firſt Deviſee, for he was dead before the Teſtator, therefore it muſt neceſſarily veſt in him, and by Conſequence muſt deſcend to his Heir at Law; that there is no Caſe wherein it hath been reſolved, that a Reſiduary Legatee in a Will ſhall carry the Lands which have been before diſpoſed by the ſame Will, tho' it ſhould happen that they cannot paſs to the firſt Deviſee, either by Reaſon of Death or any other Incapacity; that Wills are commonly guided by the Intention of the Teſtator, and that there was not a Word in this Will which ſhewed he intended theſe Lands ſhould paſs to the Reſiduary Legatees; neither is it pretended by them, that he knew the firſt Deviſee was dead.

Now 'tis a ſettled Rule in the Conſtruction of Wills, that both as to the Perſon's Taking, and as to the Eſtates which they take, all muſt ariſe from the Intention of the Teſtator, which Intention muſt be collected out of the Words of the Will it ſelf; now here are no Words in this Will which import that the Teſtator intended theſe Lands ſhould paſs to the Reſiduary Deviſees.

This being premiſed, and it plainly appearing by the firſt Clauſe of this Will, that the Teſtator had diſpoſed all his Lands, therefore the Words Real and Perſonal Eſtate in the laſt Clauſe, ſhall be intended a Deviſe of his Chattels real; for 'tis abſurd to ſay, that what he had before deviſed to one in Fee, ſhould go over to another.

Beſides he having deviſed all other his real and perſonal Eſtate not before deviſed, there the Word Other is a Relative, and cannot refer to any Lands before given, but makes that Clauſe as ſtrong as if he had excepted the Lands before deviſed, by particularly naming them, becauſe there muſt be

other Lands to ſatisfy that Word, and which were not deviſed before; but the Lands now in Queſtion were deviſed before.

But admitting it to be the Intention of the Teſtator, that the fifth Part of his Lands ſhould paſs to the Reſiduary Legatees; yet if the Words in the Will are not apt for that Purpoſe, thoſe Lands will not paſs; and ſo it was reſolved in * Steed and Berrier's Caſe. * Raym. 408. 1 Vent. 341. 2 Mod. 267.

The Caſe which comes neareſt this Point, and which probably may be objected on the other Side, is reported in * Allen 28. (viz.) The Teſtator deviſed a Manor to T. S. for ſix Years, &c. and afterwards by the ſame Will he deviſed all the reſt of his Lands in Somerſetſhire, or elſewhere, to his Brother and his Heirs: It was adjudged, that the Reverſion after ſix Years paſſed; but in that Caſe, and ſome † other of the like Nature, it appears in the Wills themſelves, that the Teſtators had other Eſtates to diſpoſe, and that they uſed ſufficient and apt Words to paſs them. * Allen 28. † 1 Lev. 112. 1 Saund. 180. 2 Vent. 285.

The Queſtion was truly ſtated on the other Side, (viz.) Whether the fifth Part of the Teſtator's Lands ſhould deſcend to the Heir at Law, or paſs over to the Reſiduary Deviſees as not diſpoſed before, becauſe John Paine, one of the five Deviſees, died in the Life-time of the Teſtator, and by Conſequence it could not paſs to him; but it ſeems plain, that it ſhall paſs to the Reſiduary Deviſees by the laſt Clauſe of this Will, becauſe at that very Time when it was made, it was not diſpoſed to any other Perſon whatſoever; for it was then the Eſtate of the Teſtator, and could not be the Eſtate of John Paine, becauſe he was then dead; therefore it muſt neceſſarily paſs by the laſt Clauſe of the Will, as the Real Eſtate which the Teſtator then had, and which he had not diſpoſed before. Econtra.

As to the Word Other, 'tis reſtrained to that very Clauſe by which the Teſtator deviſed his Chattels, and cannot refer to a Deviſe of his Real Eſtate of any Kind whatſoever, becauſe it was a Deviſe to the Reſiduary Deviſees and their Heirs; now it had been in vain for the Teſtator to have mentioned the Word Heirs, if he had not intended the Lands ſhould paſs to them.

And as to ſuch Intention, it may reaſonably be collected out of the Words of this Will, that he did intend they ſhould paſs; for otherwiſe he might eaſily have worded the Clauſe in this Manner, (viz.) And all other my real and perſonal Eſtate not before-mentioned, inſtead of, not before diſpoſed,

diſpoſed; ſo that his Intention ſeems to be, that if by any Accident interpoſing his Lands ſhould not paſs to the firſt Deviſees, then they ſhould paſs over to the ſecond Deviſees, as a Reſiduum not before diſpoſed.

And though probably a Lawyer might have uſed other Words than the Teſtator had done in this Will, yet that is not to be conſidered where his Intention is ſo plain; for if the Form is not good, yet his Intention being clear, that will help the Form; but in this Caſe the whole Will is good and formal, and there is no Room to object that 'tis not ſo.

'Tis true, it was objected by the Counſel for the Plaintiff, that 'tis abſurd to ſay, that after the Teſtator had deviſed his Lands to one in Fee, that they ſhould go over to another, but this is miſrepreſenting the Caſe, for 'tis no otherwiſe to go over than in Caſe any Accident ſhould happen, that they ſhould not paſs to the firſt ſpecifick Deviſee; as if the Teſtator ſhould deviſe a particular Sum of Money to one, and all the reſt of his perſonal Eſtate to another, and it ſhould happen that this particular Legacy could not paſs to that Legatee, ſhall not the Reſiduary Legatee have it before the Executor? certainly he ſhall, and yet in that Reſpect the Executor hath the ſame Right to Chattels as the Heir hath to Lands; and as for Caſes there are none in Point.

Curia. An Executor hath not the ſame Right to the perſonal Eſtate as the Heir at Law hath to Lands, becauſe an Executor is no more than a Truſtee made by the Teſtator, but an Heir is to ſit in the Seat of his Anceſtor.

But as to the principal Matter, if a particular Eſtate for Life had been deviſed to John Paine (who died) Remainder over, ſuch a Remainder had been good, and ſo is Perkins 108. b. 109. a. and ſo ſhould this; and there is no Objection againſt it, but that it doth not appear in the Will, that the Teſtator had any Thing to diſpoſe, he having diviſed all his Lands before by the firſt Clauſe in his Will, to five Perſons and their Heirs: No Judgment was given.

The King *versus Mayor and Burgesses of* Tregenny, *&c.*

Mandamus, &c. to chooſe a Mayor, and a peremptory *Mandamus* denied.

UPON a Mandamus directed to the Mayor and Burgeſſes of *Tregenny*, to chooſe a Mayor, and ſwear him into that Office, they return that the Borough of Tregenny was incorporated by Letters Patent of King James the Firſt, by which it was provided, that the Mayor and Burgeſſes ſhall for ever after proceed to elect a new Mayor on the *Thurſday* next after *Michaelmas*-Day every Year, and that the new Mayor thus elected, ſhould be ſworn by the Mayor in Being before he went out of his Office, and that every Mayor ſo choſen ſhould continue in that Office till another was duly elected in manner as aforeſaid; and they farther returned, that the Day of Election appointed by their Charter being paſt, they could not proceed to a new Election, unleſs on the Death or Removal of the preſent Mayor, &c.

It was inſiſted for a peremptory Mandamus, that they might proceed to a new Election, tho' the Day for that Purpoſe appointed by their Charter was paſt, becauſe that Day was only directory; for if the Mayor ſhould be ſick on that Day, or out of Town, yet they might proceed to elect a new Mayor at any other Time.

There is a Caſe in * Rolls, which was in Eaſter-Term, 8 Car. in B. R. between Hicks and the Town of Lanceſton in Cornwal, where it was held, that if the King incorporates a Town by the Name of Mayor and eight Aldermen, with a Clauſe in the Letters Patent, that upon the Death or Removal of any Alderman, it ſhall be lawful for the Mayor and the reſt of the Aldermen within eight Days after ſuch Death or Removal, to elect another Aldermen in his Place; in ſuch Caſe, tho' no Election be within the eight Days, yet they may chooſe another at any Time after, becauſe they have ſuch a Power as incident to the Corporation created; and that affirmative Power which they have by the Charter it ſelf to chooſe within eight Days, &c. doth not take away that Power which they have by Implication as incident to the Corporation. * Roll. Abr. 514.

On the other Side it was argued, that there being no Exception taken to this Return; it muſt therefore be agreed, that 'tis good, and as to the other Point there cannot be an Election, but on the very Day appointed by the Charter, unleſs upon the Death or Removal of the Mayor. Econtra.

In

In these Cases of Mandamus, they are usually granted to fill up the Body incorporated, for the Sake of the Inheritance and Succession; but here the Corporation is full, so there is no Occasion of going to a new Election of a Mayor; now it being returned, that the Day of Election appointed by their Charter being past, they cannot proceed to a new Election, unless on the Death or Removal of the present Mayor, if this is not true, then it ought to have been * traversed on the other Side, and the Mayor and Burgesses might have taken Issue, or have demurred; and upon a Verdict or Judgment on the Demurrer, they might have Damages and Costs as in an Action on the Case; and there being neither a Traverse or Demurrer to this Return, this is a good Answer why no peremptory Mandamus shall go.

*9 Annæ cap. 20.

Then it was objected to this first Writ of Mandamus, (viz.) That it was not well directed; for it was to the Mayor and Burgesses, to elect and swear a new Mayor; whereas the Power of administring an Oath is in the Mayor only.

'Tis true, a Mandamus is not to be superseded without a Return first made, because by a Return, the Fact ought to appear judicially before the Court; but where there is a Return, as in this Case, and it appears that the Writ is wrong directed; in such Case it ought to be quashed.

The Difference is very plain between a Writ to elect and a Writ to swear another into an Office; for the one may be directed to the whole Body corporate, but the other must be directed to him alone, who hath Power to administer an Oath, and no Body can have that Power, but by special Words from the King; therefore this Mandamus cannot be good, because the Execution thereof would subject the Person executing it to an Information, for usurping an Authority where he had none.

Curia. Here are two Objections made to this Mandamus, (viz.) That the Writ is not good, and that the Corporation cannot proceed to choose a new Mayor on any other Day, than the very Day appointed by the Charter.

The Objection to the Writ is, that 'tis directed to the Mayor and Burgesses to elect and swear a new Mayor, which is wrong; for tho' the Mayor and Burgesses are to elect, yet 'tis the Mayor alone who must administer an Oath to the Person, for the Burgesses cannot; therefore this Direction is wrong.

But this may receive a very plain Answer by a reasonable Construction of the Matter distributively in the Manner as directed by the Writ, the Words being eligetis & Juretis

ſecundum authoritatem veſtram, ſo that 'tis a Writ to the Body corporate to elect, they having the Inheritance as to the Election of a Mayor; and 'tis a Writ to the Mayor, who hath a ſpecial Power to ſwear the Perſon elected into the Office, ſo that Reddendo ſingula ſingulis, the Writ is well directed.

And it could not be otherwiſe, unleſs there had been two Writs granted, the one to elect and the other to ſwear the Perſon elected, ſo that this being a miniſterial Writ, is ſo far good; 'tis true, all to whom the Writ is directed are to do ſomething, (viz.) They are to elect, and to be preſent when the Perſon elected is to be ſworn; and there is no material Difference between one Man being ſworn by another, and being ſworn in the Preſence of another; ſo that thoſe who are preſent when the new Mayor is ſworn may ſo far be ſaid to have a Power to ſwear him, for the Mayor himſelf doth no more than being preſent, it being uſual for the Town-Clerk to adminiſter the Oath:

So that the chief Queſtion in this Caſe is, that where a certain Day is appointed by the Charter for the Mayor and Burgeſſes to proceed to the Election of a new Mayor; and that Day being paſt, Whether they can elect on any other Day in that Year, and the Court was of Opinion they could not, unleſs upon the Death or Removal of the Mayor in Being; for if they ſhould elect on any other Day, 'tis not ſecundum authoritatem given by the Charter.

And there can be no Inconvenience if they ſhould ſtay till another Day appointed by the Charter for them to chuſe a new Mayor, becauſe 'tis expreſly provided, that the Mayor elected ſhall continue in his Office till another is duly choſen, which cannot be but upon the very Day appointed, as aforeſaid, for where they have no Power by their Charter to chuſe on any other Day, their Corporation ſhall be diſſolved rather than they ſhould make an Election on another Day; and this Court cannot compel them to chuſe a Mayor on any other Day, where there is a Mayor already in Being.

So a peremptory Mandamus was denied.

Waller's *Caſe*.

Writ of Error depending in the Exchequer-Chamber moved to ſtay Proceedings on a *Sci. fa.* againſt the Bail.

M. THE Court was moved to ſtay Proceedings on a Sci. fa. brought againſt the Bail, there being a Writ of Error depending in the Exchequer-Chamber.

Curia. The Rule in the Caſe of Myer *verſus* Arthur, upon a Motion in this Court in Eaſter-Term, 8 Georgii, was, that if the Defendants in the Scire facias will confeſs Judgment, and enter into a Rule to pay the Debt, or to deliver up the Principal within four Days after the Judgment ſhall be affirmed, in ſuch Caſe the Proceedings on the Scire facias ſhould be ſtayed; and the Chief Juſtice was of Opinion, that the like Rule ſhould be made in this Caſe.

'Tis true, the Plaintiff in the Scire facias is to have Judgment immediately againſt the Bail, but he is tied up from ſuing out Execution until four Days after the Judgment ſhall be affirmed, and then on Non-payment of the Debt, or not rendring the Principal, he is at Liberty to take out Execution, and by this Means Expences would be ſaved on both Sides.

Aldridge *verſus* Snowden.

Pending a Writ of Error, Proceedings on a *Sci. fa.* againſt the Bail ſhall be ſtayed.

THIS was likewiſe a Motion to ſet aſide a Judgment againſt the Bail where the ſecond Scire facias againſt them was returnable on the 13th Day of May, and the Writ of Error was allowed on the ſame Day, and Notice thereof given to the Attorney for the Plaintiff, who notwithſtanding ſuch Notice, ſigned Judgment; and for an Authority in Point the Caſe of Myer *verſus* Arthur was cited, Paſchæ 8 Georgii, where it was reſolved by this Court, that after a Writ of Error is brought on the principal Judgment, the Proceedings upon a Scire facias againſt the Bail ſhall ſtay, and the Bail ſhall have four Days after the Affirmance of the Judgment, to render the Principal, or pay the Condemnation-Money; and upon the Authority of this Caſe, a Rule was now made for the Plaintiff to ſhew Cauſe, &c. why the Judgment ſhould not be ſet aſide.

And upon another Day a Motion was made to diſcharge that Rule, becauſe the Bail ought to render the Principal, &c. on the very Day that the ſecond Scire facias was returnable, otherwiſe the Plaintiff muſt have Judgment, and it ought not to be ſet aſide.

'Tis true, the Bail have brought a Writ of Error on the very laſt Day allowed by Law for them to render the Principal, and gave Notice thereof about Three of the Clock in the Afternoon, but did not render the Principal till nine Days afterwards, which cannot diſcharge the Bail, neither is it any Foundation to ſet aſide this Judgment againſt them.

The Counſel for the Bail likewiſe cited Myer and Arthur's Caſe to prove, that they ought to be diſcharged, for in that Caſe the ſecond Scire facias was returnable 13 February, which was the laſt Day of Hillary-Term, and Notice given, that a Writ of Error was allowed two Days before; and the Plaintiff intending to proceed on the ſecond Scire facias, was ſtopped upon a Motion. *Econtra* for the Bail.

'Tis true, the Render of the Principal on the Day the ſecond Scire facias is returnable, would be too late, if the Writ of Error did not help it; but that being brought before the Return of the ſecond Scire facias, the Bail hath Time till four Days after the Affirmance of the Judgment.

To which it was anſwered, that this Judgment was regular, and tho' if the Bail had come before the Return of the ſecond Scire facias, and moved the Court that Proceedings might be ſtayed againſt them, there might have been ſome Indulgence; but when they did not make any Application till after the Judgment was ſigned, it ought not now to be ſet aſide.

The Chief Juſtice was of Opinion, that it was neceſſary to move the Court to ſtay Proceedings; and if they could be ſtayed upon a Motion, then if the Defendants paid Coſts, and the Plaintiff was put in as good a Condition as if the Motion had been made in Time, the Court may ſtay the Proceedings, tho' the Motion was made out of Time, and the rather, becauſe 'tis againſt the Bail, who ought to be favoured as far as poſſible. Curia.

But two other Judges (there being no more in Court) were of a contrary Opinion; they agreed that the Bail might ſurrender the Principal at any Time before the Return of the ſecond Scire facias, but that was not done; and 'tis certainly an Indulgence to ſtay Proceedings in ſuch Caſes upon a Motion, tho' the Bail come in Time; but 'tis never done when they come out of Time, for that would be to carry the Indulgence of this Court farther than ever it was carried.

'Tis true, this is a hard Caſe on both Sides, for the Plaintiff may be in ſome Danger of loſing his Debt, if the Bail cannot be charged; beſides, this Judgment is regular, and a Motion was never yet made to ſtay Proceedings on a regular Judgment; ſo the Rule was diſcharged.

DE
Term. Sanct. Trin.
Anno 9 Georgii, 1724.

The King *verſus* Alexander John.

Information in Nature of a *Quo Warranto* for uſurping the Office of Mayor.

UPON a Motion in Trinity-Term laſt, a Rule was made for the Defendant to ſhew Cauſe why an Information in the Nature of a Quo Warranto ſhould not be granted againſt him, to ſhew by what Authority he claimed to be Mayor of Leſtwithiel in the County of Cornwal.

And in Hillary-Term following this Cauſe was ſhewn, (viz.) That by the Charter of Incorporation, a Mayor is always to be elected out of the capital Burgeſſes, and to continue in his Office till a new Mayor is duly choſen; that the Defendant, who is the preſent Mayor, was never a capital Burgeſs, and conſequently could never be duly choſen Mayor out of thoſe Burgeſſes, and therefore is no Mayor.

The Anſwer was, That he was choſen a capital Burgeſs in the Year 1697, and that as many of the Inhabitants as are now living ſaw he was duly elected, excepting one John John, who now complains againſt him, and that having ſo long acquieſced under that Election, it ſhall not now be brought in Queſtion, it being a ſtanding Rule in Caſes of this Nature, that they ſhall not be examined in ſuch remote Degrees; for if they ſhould, then they might enquire whether the Defendant was a Freeman before he was a Burgeſs, and whether he was a Burgeſs before he was a capital Burgeſs, which would be very inconvenient.

That the Defendant was chosen Mayor in the Year 1706, and that the Corporation for some Differences arising amongst themselves, did not proceed to any Election of capital Burgesses since that Time, so that this Borough wanted a sufficient Number of such Burgesses to elect a new Mayor, and for that Reason the Defendant had continued Mayor ever since.

The Chief Justice was of Opinion, that the Fact was plain, that the Defendant had been Mayor of this Place for * sixteen Years together, which is a sufficient Cause for an Information, so that the Rule was made absolute, and the Parties were left to try the Right upon this Information; tho' one of the Judges was of Opinion, that a Mandamus to elect a capital Burgess and a Mayor, had been a good and proper Method.

Curia. * By the Stat. 9 *Ann. cap.* 20. No Person who hath or shall be in an annual Office for one Year, shall be chosen into the same Office the next Year, &c.

Afterwards a Trial was had upon this Information, and a Verdict was found for the Plaintiff; and now it was moved to set it aside, and for an Attachment against John John, for not producing the Corporation-Books at the Trial, according to a Rule of Court made for that Purpose, with which he was served.

As to the first Part of this Motion, (viz.) To set aside the Verdict, the Court took Time to consider it, and that Justice Fortescue would in the mean Time consult with Baron Price, who tried the Cause, and report his Opinion, who afterwards informed the Court, that he had spoke with the Baron, whose Opinion was, that the Verdict was not against Evidence, but that the Proof was only by one Witness, that the Defendant was a capital Burgess duly elected, and that the Evidence that it was not a due Election was given by John John only, and no more, and that it was objected against his Evidence at the Trial, but the Objection was overruled, and he (the Baron) was satisfied with the Verdict.

However, it was moved for a new Trial upon a Suggestion, that this John John who was the only Witness against the Defendant, kept the Corporation-Books from him, so that they could not be produced at the Trial, he being served with a Rule of this Court to produce them; and it was further moved, that an Attachment might be granted against him for a Contempt; and it was insisted, that if this Verdict should stand, a great Inconvenience must necessarily follow; for it would avoid all the Acts of this Corporation ever since the Defendant had been Mayor; for if he was not a lawful Mayor, then all the corporate Acts done by him are void.

The

Econtra. The Counsel on the other Side argued, that this was a good Verdict, and given upon good Evidence, and ought not to be set aside, or a new Trial granted, because the Judge who tried the Cause was satisfied with the Verdict, and reported that it was given on good Evidence; and that to argue a Right from the long Possession of this Office, when that Right had been tried upon an Information and found against the Defendant, that he had no Right, was a new Sort of Defence, and a very strange one too.

'Tis true, the Possession might be given in Evidence, that he had a Right to vote as Mayor, &c. because every Officer de facto hath such a Right; but certainly his Right to the Office it self can never be determined upon a Trial of his Right to vote as Mayor.

'Tis true, there was a Rule made for this John John to produce the Corporation-Books at the Trial, but as to that Matter he hath positively made Oath, that he hath not those Books, and that he doth not know who hath them, and therefore he shall not be in Contempt without a wilful Default.

Curia. There is no Room for an Attachment, because this Person hath not disobeyed the Rule, and a new Trial shall not be granted, because that would be against the Report of the Judge before whom this Trial was had, who was satisfied that the Verdict was not against Evidence; so that nothing is offered for a new Trial, but only that the long Continuance in the Possession of this Mayoralty supposeth, that the Defendant had a Right to be Mayor, and the Inconvenience, if he was not Mayor, would be to avoid all the corporate Acts done by him as Mayor for many Years last past.

'Tis true, if the Question had been at the Trial, Whether the Defendant had a Right to vote, or not, or whether he had taken the Oaths or received the Sacrament within the Time limited by the Statute, in such Case his being Mayor de facto, and a long Acquiescence under such a Mayoralty would be a strong Evidence for him; but when the Question only was, Whether he was duly elected into that Office, that is a Question concerning the Right, and in such Case the long Possession of the Mayoralty, or the many Inconveniencies that would follow if he was not duly elected, ought not to be regarded.

So that this Verdict being given on good Evidence, and so certified by the Judge who tried the Cause, shall not be set aside for any of the Reasons before-mentioned; and thereupon

the Rule was discharged, against the Opinion of Justice Forteſcue, who was for the Poſſeſſion.

The King *verſus* Harriſon.

THIS was likewiſe a Motion for an Information in Nature of a Quo Warranto againſt the Steward of a Court-Leet, and againſt the Bailiff and the Conſtables for impanelling a Jury not duly ſummoned, the Bailiff being the proper Officer to ſummon them, who ſhould be all Freeholders, for they only have a Right to be Jurymen, but there were none ſummoned, and ſix other Perſons who had no Right being preſent in Court, were ſworn of the Jury, and ſix Freeholders being likewiſe in Court, refuſed to be ſworn, becauſe they were not ſummoned, neither would they ſerve with thoſe who had no Right to be of the Jury, whereupon the Steward ſwore ſix more; and the Jury thus conſtituted by the Steward, of twelve Perſons who had no Right to be Jurymen, choſe the Bailiff and Conſtables; this being the Fact, a Rule was made for the Defendant to ſhew Cauſe why an Information ſhould not go againſt him.

Information in Nature of a *Quo Warranto* againſt a Steward of a Leet for impanelling a Jury not duly ſummoned.

And now he ſhewed for Cauſe, that the ſix Freeholders who appeared in Court were duly ſummoned, but that they refuſed to be ſworn of the Jury; whereupon the Steward ſwore a Jury out of ſuch Perſons who were preſent in Court, which he inſiſted was a good Election, which Jury choſe the two Conſtables and one Bailiff of the Manor, and that this was the conſtant Courſe of chuſing ſuch Officers; and that it would be dangerous to make a Precedent of trying the Right of chuſing ſuch Men by a Quo Warranto.

Here is no Room for any Complaint againſt the Conſtables or Bailiff; but if any, 'tis againſt the Steward, and therefore a Rule was made for him to attend, and to ſhew Cauſe why an Attachment ſhould not go; and the Rule for the reſt was in the mean Time enlarged. Curia.

The King *verſus* Althoes, *Father and Son.*

THIS Cauſe began in Hillary-Term, and afterwards the Attorney General moved in Eaſter-Term laſt for an Habeas Corpora directed to the Gaoler of the common Gaol in the County of Pembroke, to remove the Bodies of Thomas

Indictment for Murder removed out of *Wales*, and tried in an *Engliſh* County.

mas Althoe the Father, and Thomas Althoe the Son, from the Gaol in * Pembroke to the Keeper of the Gaol in the County of Hereford, that being the next Engliſh County to Pembroke, and likewiſe for a Certiorari to be directed to the proper Officer to remove the Indictment found againſt them in Wales, and to the Coroner of Pembrokeſhire to remove the Inquiſition taken by him upon the View of the Body of George Martin, who was murdered by the Father and Son in a barbarous Manner, and for which an Indictment was found againſt them in Wales.

* *See* 1 Lev. 118. 3 Mod. 64.

Econtra. On the other Side it was ſaid, that Mr. Attorney founded his Motion upon the Statute 26 H. 8. by which 'tis enacted, that Juſtices of Peace and of Gaol-delivery in the Counties next adjoining to *Wales*, where the King's Writ runneth, may hear and determine all Felonies, and their Acceſſaries, committed in *Wales*, or the Marchers thereof, but this Clauſe extends only to Lordſhips Marchers, and not to any of the antient Counties in Wales.

26 H. 8. cap. 6.

Beſides, the aforeſaid Statute was altered about eight Years after it was made; for by the Statute 34 & 35 H. 8. by which Wales is divided into twelve Counties, and Judges appointed to keep their Seſſions in the ſaid Counties, it was enacted, that thoſe Judges might hold Pleas of the Crown in as large a Manner as the Judges in Weſtminſter-Hall, and that they ſhall enquire, hear and determine all criminal Offences whatſoever, committed within their ſeveral Limits, and adminiſter common Juſtice to all the King's Subjects there, according to the Laws of *England*.

34, 35 H. 8. cap. 26.

So that by this ſubſequent Statute the Defendants ſhall not be put to their Trial elſewhere, but only where the Fact is ſuppoſed to be committed, which in this Caſe was in Pembrokeſhire; if it ſhould be otherwiſe, then all criminal Caſes which the Judges in Wales have Power to hear and determine by the Statute laſt mentioned, would be removed to England, where he who is pooreſt, either the Proſecutor or the Criminal, muſt ſuffer for Want of Money to bring and ſupport his Witneſſes in an Engliſh County.

It might be for this Reaſon, that a Criminal indicted in Wales ought to be tried there.

The Court took Time to conſider theſe Statutes, and declared, that if it was in their Power, they would grant the Motion made by Mr. Attorney, becauſe it was very difficult to have Juſtice done in Wales, by a Jury of Welſhmen, for they are all related to one another, and therefore would rather

ther acquit a Criminal, than have the Scandal, that one of their Name or Relations ſhould be hanged; and that to try a Man in Wales for Murder, was like Trying a Man in Scotland for High Treaſon, thoſe being Crimes not much regarded in thoſe reſpective Places.

And at another Day the Court declared, that it would be better only to grant the Habeas Corpora without the Certiorari, for if both ſhould be granted, it would delay the Proſecution, becauſe if the Indictment and Inquiſition ſhould be removed, they come both into Court the next Term, and not before; and they muſt both be ſent down by Mittimus to the next Aſſiſes in Hereford, which would not be till March following, ſo that the Defendants could not be tried before that Aſſiſes; but if the Attorney General would enter a Nolle proſequi as to the Indictment already found in Pembrokeſhire, then the Defendants might be indicted again for the ſame Fact in Herefordſhire, and tried at the Summer Aſſiſes, which would be the beſt, and the moſt ſpeedy Method.

Thereupon a Nolle proſequi was entered, and an Habeas Corpora granted, and the Defendants were indicted and tried in the County of Hereford, and both found guilty of Murder; but becauſe their Counſel inſiſted, that this was a Miſtrial, the Judge who tried the Defendants, would not give Sentence to execute them.

Whereupon the Attorney General moved in the Beginning of the next Term for an Habeas Corpora to bring up their Bodies to the Court, that they might receive Sentence of Death, and for a Certiorari to remove the Record, ſo that the Court might have all before them to give Judgment; all which was granted.

And accordingly about a Fortnight afterwards, both the Father and Son were brought to the Bar, and their Counſel objected, that their Trial in an Engliſh County, and by a Jury of Engliſhmen, was a Miſtrial; for if it was good, it muſt be by Virtute of the Statute 26 H. 8. as aforeſaid; but it could not be good by that Statute, becauſe it extended only to thoſe Counties which were Lordſhips Marchers, and not to any of the ancient Counties in Wales, of which Pembrokeſhire was one, and there were ſeven more, (viz.) Glamorgan, Caermarthen, Cardigan, Flint, Caernarvan, Angleſea and Merioneth; 'tis true by that Statute, 'tis enacted, That the Juſtices of Gaol Delivery in the Counties next adjoining to *Wales*, where the King's Writ runneth, ſhall hear and determine Felonies, and their Acceſſaries committed in *Wales*, or the Marchers thereof; and that an Acquittal of Felony in any

Lordſhip Marcher ſhall not be a Bar for any Perſon indicted for the ſame within two Years next after ſuch Offence committed, ſo that it ſeems plain this Statute relates only to the Lordſhips Marchers, who claimed ſeveral Privileges, as to acquit Criminals upon Payment of Fines, &c. which was never claimed in any of the old Counties.

On the other Side, the Attorney General inſiſted, that all Wales was comprehended by that Statute 26 H. 8. and 'tis ſo explained to be by a ſubſequent * Statute made in the ſame King's Reign, by which Wales was divided into twelve Counties, whereof eight were declared to be the ancient Counties as before-mentioned, and four other were made by the Statute 27 H. 8. cap. 26. (viz.) Radnor, Brecknock, Montgomery and Denbigh.

* 34 & 35 H. 8. c. 26.

But at the Deſire of the Priſoners, they had Counſel aſſigned to argue that Point, and afterwards one of their ſaid Counſel moved for a Copy of the Writ of Habeas Corpora by which the Priſoners were removed from Pembroke to Hereford, and likewiſe for a Copy of the Certiorari by which the Record was removed if any ſuch there was; and if not, then for a Copy of the Order by which they were brought to Hereford, be it what it would, ſo that they might have the whole Proceedings before them; but this Motion was not granted.

For the Priſoners.

And the Caſe being appointed to be argued this Term, the Counſel for the Priſoners inſiſted, that their Trial in Hereford for Murder committed in Pembrokeſhire, was againſt a fundamental Principal of the Common Law, which appoints, that all Trials ſhall be per pares; and that by Neighbours upon a Preſumption, that Vicinis acta Vicini cognoſcuntur; ſo that this muſt be a Miſtrial at Common Law.

This is a Cauſe of very great Conſequence to the Principality of Wales, becauſe if a Fact committed there might be tried in an Engliſh County, then the richeſt Man will always bring his Cauſe to be tried there; and as it hath been already obſerved, the Poor Man muſt ſuffer for want of Money to carry all his Evidence thither, either for his Defence, or to proſecute another; and no Perſons are ſo well able to judge of the Truth of what is ſworn, as the Neighbours of a Witneſs to whom he is known, ſo that by this Means a powerful and rich Man may procure ſuch Evidence as to have Credit where they are not known, when the ſame Perſons might have no manner of Credit by them who are their Neighbours.

It muſt be admitted, that ſuch a Trial could not be at Common Law, neither is it allowed by that Statute 26 H. 8. as they would inſinuate on the other Side; and this may appear upon the Reaſon of making that Statute, which was as followeth:

ſt. In former Ages, when the Britains were drove out of England, and retired amongſt the Mountains in Wales, they would frequently make Inrodes in a hoſtile Manner into England, their native Country, to prevent which, the Kings of England gave large Tracts of Lands to ſome of their moſt powerful Subjects on the Borders, and theſe were called Lordſhips Marchers, and ſuch Lands which the Kings kept on thoſe Frontiers, or which reverted to the Crown by Forfeitures, or otherwiſe, were called the King's Lordſhips Marchers.

But afterwards theſe Lords Marchers pretending to ſome extravagant Privileges, without any Manner of Right, therefore this Statute was made to curb them, and it was calculated for that very Purpoſe; this plainly appears by another * Statute made the very next Year, by which Wales was incorporated, united and annexed to England, and that all Perſons born in Wales ſhould enjoy the ſame Liberties as the Engliſh, and that the Laws and Statutes of this Realm, and none other, ſhould be had, uſed, and executed in Wales, and divers Lordſhips Marchers were by this laſt Statute united to Engliſh Counties, and others to Welſh Counties, and the Reſidue were divided into new and particular Counties by themſelves, and thoſe were Brecknock, Radnor, Montgomery, and Denbigh; ſo that the Eight old Welſh Counties are not within that Act, but only thoſe four Counties which were cut out of the Lordſhips Marchers.

* 27 H. 8. cap. 26.

'Tis true, there have been ſeveral Attempts made to bring Trials from thoſe old Counties to the next Engliſh Counties, but ſuch Attempts never yet prevailed; yet ſo far they have gone as to obtain Certioraries to remove Indictments taken in this very County of Pembroke, becauſe thoſe are Declarations for the King, which he may remove where he pleaſes; beſides, the Court of King's Bench hath been formerly of Opinion, that they had Power to remove Indictments out of thoſe Counties, to ſee whether they were good, and that they might quaſh them if they were not; but that if they were good, then to remand them back by Mittimus into the proper Counties by Virtue of thoſe very Statutes; but

the Judges were not resolved, that Indictments thus removed could be tried in the next English County; yet after several Arguments at Bar, Anno 31 Eliz. Whether a Certiorari would lie to remove an Indictment out of Caernarvan, or not, the Court would not determine it, and therefore that Indictment was tried in the proper County; and where-ever an Indictment was removed, there is a Quære how the Court must proceed upon it; and in * Chedle's Case, which happened Anno 9 Car. 1. which was an Indictment for Murder found in Anglesea, and a Certiorari granted to remove it; the Court declared that they were not yet resolved, that it could be tried in an English County; and my Lord Chief Justice † Vaughan, who was a Native of Wales, and may for that Reason be presumed to have studied the Law relating to that Country, was of Opinion, that this Statute 26 H. 8. related only to the four Counties taken out of the Lordships Marchers.

* 1 Roll. Abr. 394. Cro. Car. 331.

See 1 Lev. 118. The King *v.* Thomas.

† Vaughan's Rep. 413.

The Words of that Statute upon which this Question doth arise, are, (viz.) That the Offence shall be tried in the next *English* County adjoining to the Lordships Marchers, or other Part of *Wales*, where it was committed.

Now it is to be considered, that Wales was originally a Kingdom of it self, afterwards a Principality, and subjected to England by King Edward I. Anno 1282, and afterwards by the Statute of Rutland, it was provided in what Manner civil and criminal Causes should be tried there; and there is a Clause in the Statute 27 H. 8. by which Wales was incorporated to England, that the said Statute should not extend to derogate from any other Act before that Time made for the Trial of Murder or Felony committed in any Lordship Marcher, or in any County of England next adjacent thereunto, which is an evident Proof, that the Statute 26 H. 8. did not include all Wales.

As to that Clause, (viz.) That such Offences shall be tried in the next English County adjoining to the Lordships Marchers, or other Part of Wales where they were committed, there the Word Such is a Relative; and 'tis in the enacting Part of the Statute, and therefore must refer to some antecedent, which must be to some Crime mentioned in the Preamble, and the Words other Part of Wales, where the Offences were committed, must be intended other Parts, which were neither within the Lordships Marchers, or within the old Counties.

'Tis the Opinion of my Lord * Coke, that all Statutes ought to be interpreted, so as the Innocent may not suffer; and that to construe an Act by itself, is the best Sort of Construction, because 'tis ex Visceribus causæ; but if this Act should be construed, as the Prosecutors would have it, then it would take away all Jurisdiction from Wales, and make the Statute it self of no Effect, for it would be absurd and inconsistent to exclude all Wales from a Jurisdiction of trying Offences by removing the Indictments into English Counties, when this very Statute expressly gives a Jurisdiction to Part; for it provides, That all Felonies, and their Accessaries, committed in the County of Merioneth, shall be enquired, heard and determined in the Counties of Caernarvan or Anglesea, before the Justice of North-Wales, or his Deputy, and by an Inquest of Caernarvan and Anglesea. * 1 Inst. 11.

Besides, by the aforesaid Statute of incorporating Wales with England, 'tis enacted, That all Persons born there shall enjoy all Liberties as other Subjects of England do enjoy; and 'tis certainly a very valuable Liberty and Privilege for a Man to be tried by his Equals and Neighbours, which Privilege hath been enjoyed by the Welsh ever since the making that Statute, which is now above 100 Years; and during all that Time there is no Instance to be given of removing any Trial from either of the old Welsh Counties, to be tried in an adjoining English County; and it would be very hard to make a Precedent for that Purpose after such a Length of Time. 27 H. 8. cap. 26.

Then it was objected against the Record, (viz.) To the Indictment on which the Prisoners were tried, the Caption whereof was, That the Grand Jury (naming them) were Jurati & onerati ad inquirendum pro corpore Comitatus Herefordiæ, which must be of something arising within that County; but here the Fact did not arise in that County, but in Wales.

It was argued on the other Side, that though it was the fundamental Rule of the Common Law, That Trials should be had per pares & de Vicineto, yet that Rule will be of no Weight when the Manner of Trials is altered by Act of Parliament, as it was in this Case, and that upon due Consideration and for the Advancement of Justice. Econtra.

Now as to this Statute, upon which the present Question doth arise, 'tis as full as Words can express it, that the

the Trial of a Fact committed in Wales may be in the next Engliſh County; for by the plain and poſitive Words of the Act, all Wales is included; 'tis true, the Lordſhips Marchers are often repeated in this * Statute, and from thence 'tis inferred, that it was made to redreſs ſuch Abuſes which were committed there.

* 26 H. 8.

But 'tis plain, that this is a remedial Law, and made to redreſs all Abuſes, as well in every County in Wales as within the Lordſhips Marchers; and there are Clauſes in it which meet with every Abuſe, as well within the one as the other.

'Tis true, the Lords Marchers did pretend to have ſeveral Privileges and Immunities which were never claimed by the reſt of the People in Wales, and therefore this Statute (which was made for the Remedy thereof) was penned with particular Clauſes to meet with thoſe Miſchiefs; as where they pretended to a Privilege, that none of the King's Miniſters ſhould enter into their Territories; and a Privilege to pardon Murders, and to acquit Perſons who had committed † capital Offences upon paying Fines; and that ſuch Acquittal ſhould be a Bar to any ſubſequent Trial for the ſame Fact; and therefore it was provided by this Statute, that no Acquittal in the Lordſhips Marchers ſhould be a Bar to a Trial in an Engliſh County, if it was proſecuted within two Years after ſuch Acquittal, which Clauſe, though 'tis general in the Statute, muſt be intended an Acquittal by paying a * Fine only; for this being a remedial Law, was calculated to meet with all the Grievances in Wales.

† See the Caſe of *The King* verſus *Thomas*.

* So is the Statute 34 & 35 H. 8. cap. 36. (*viz.*) None ſhall be put to his Fine for Murder or Felony, but ſhall ſuffer according to the Laws of *England*.

27 H. 8. cap. 5.

The Statute 27 H. 8. which was made the very next Year, complains of Want of Juſtice in Wales, which is a Proof, that the Statute 26 H. 8. intended likewiſe all Wales, for indefinitum æquipollet Univerſale, therefore this Act intended all the old Counties as well as the Lordſhips Marchers.

34 & 35 H. 8. cap. 36.

And farther, the Statute 34 & 35 H. 8. recites all Wales, and in the ſaid Recital there are theſe Words, (viz.) Tho' the Statute 26 H. 8. was never put in Execution in the Counties of Angleſea, Merioneth, or Caernarvan, it ſhall be uſed as Law in them as well as in South Wales, &c.

Now Pembrokeſhire is Part of South-Wales; 'tis true, no Caſe comes up to the Point now in Queſtion; but yet for the Reaſons before-mentioned, a Trial in an Engliſh County for a Fact committed in Wales is good.

In that Caſe of the King and Thomas, the Defendant pleaded Autrefoits acquit when he ſhould have demurred to the Juriſdiction, and the extrajudicial Opinion of the Lord Chief Juſtice Vaughan in that Caſe, is the only Opinion againſt a Trial in an Engliſh County, but it doth not appear what induced him to be of that Opinion.

This Statute 26 H. 8. appears plainly to be made to enlarge the King's Juriſdiction which was wanting in Wales, and for the Advancement of Juſtice; and therefore it ought to be conſtrued, ſo that all the Clauſes therein may ſtand together, and not that one ſhould make the other Void, but ſhould be expounded by each other, for ſuch a Conſtruction is ex viſceribus cauſæ, as well as a Conſtruction of the enacting Part by the Preamble.

Now in the enacting Part of this Statute, 'tis ſaid, that Juſtices of Gaol-Delivery in the Counties next adjoining to the Lordſhips Marchers, or other Part of Wales, may hear and determine all Felonies and their Acceſſaries committed in Wales, or the Marchers thereof, which Words other Part of Wales can never be intended (as inſiſted on the other Side) other Part thereof which was neither within the Lordſhips Marchers, or the old Counties, becauſe there is no Part of Wales but what is within one of them.

And ſuch Counties there were ever ſince Wales was united to England, as appears by the Statute 12 Ed. 1. called Statuta Walliæ, where there are many good Laws concerning the Diviſion of it into Counties; and Sheriffs were there, which ſhews that it muſt be then appointed into Counties.

It was the expreſs Judgment of the Parliament, Anno 34, 35 H. 8. that Offences done in thoſe old Counties might be tried in the next adjoining Engliſh County, by Virtue of the Statute 26 H. 8. aforeſaid; for by that firſt Statute, 'tis appointed, that Offenders in Merioneth may be tried in Salop, and ſo might thoſe of Angleſea or Carnarvan, tho' the Act 26 H. 8. was never yet put in Execution there; yet by the aforeſaid Statute it was declared to be in Force there, as well as in South-Wales, which are general Words.

So that by the ſaid Statute 26 H. 8. it was thought neceſſary to curb the Inſolence of the Lords Marchers, and to prevent an Acquittal by paying a Fine to be a Bar to a Proſe-

cution

cution of a Criminal in an Engliſh County for a Fact committed in Wales, ſo as ſuch a Proſecution was commenced within two Years after the Acquittal.

The Lord Chief Juſtice Vaughan admits, that an Exigent and a Capias utlegatum went into the ancient Welch Counties ever ſince the Reign of Ed. 1. tho' not into the Lordſhips Marchers; and the Reaſon was, becauſe they had no Sheriffs in the ſaid Marchers; and as to the Inconveniency of removing Cauſes into Engliſh Counties, there is none as pretended on the other Side, becauſe the Proſecutor is never allowed to remove the Cauſe without good Cauſe ſhewed; but the King may remove his Cauſe at Pleaſure.

Curia. All that can be ſaid for the Priſoners hath been fully urged by their Counſel, but the Court is bound by expreſs and plain Words in this Act of Parliament, the Preamble whereof complains of great Offences in Wales, which are general Words, and comprehend all Wales, and in the enacting Part, 'tis declared, that the Miſchiefs were all over Wales, but greater in the Lordſhips Marchers, ſo that 'tis plain the Parliament intended to give ſome Remedy to the whole, that it might be adequate to the Miſchief, and meet it in as large a Manner as poſſible.

Now thoſe general Words in the enacting Part, ſhall never be reſtrained by any Words introducing that Part; for 'tis no Rule in the Expoſition of Statutes to confine the general Words of the enacting Part to any particular Words either introducing it, or to any ſuch Words even in the Preamble it ſelf; 'tis true, my Lord Coke commends a Conſtruction which agrees with the Preamble, but not ſuch as may confine the enacting Part to it.

W. Jones 163. Palm. 485.

And of the ſame Opinion was the Lord Chief Juſtice Holt in Chambers his Caſe, who was tried here for a Murder committed in Barcelona in Spain, who ſaid that Trial was good by Virtue of the Statute 27 H. 8. cap. 4. though the Caſe was not within the Miſchief recited by that Act.

Cro. Car. 498, 533.

So that upon the whole it muſt be admitted, that a Preamble may be a good Expoſitor of a Statute, but what was offered on the other Side is not properly a Preamble, but only introductive to an enacting Part of the Statute; beſides, there was a Time when there were no Preambles to Acts of Parliament; and yet they were good; and even at this Time Preambles are no more than Recitals of Inconveniencies which do not exclude any other to which a Remedy is given by the enacting Part.

5 'Tis

'Tis true, there is an extrajudicial Opinion of my Lord Vaughan, against such Trials in an English County; but he being a Native of Wales, might be prejudiced in Favour of his Country, and his Notes were never revised or designed by him to be printed.

As to the Objection, that Part of Wales is entrusted with Trials of Facts arising there, as that an Offence in Merioneth shall be tried in Anglesea; and therefore it would be inconsistent to say, that the Jurisdiction should be taken from the whole when 'tis expressly given to Part; the Answer is, that no Jurisdiction is taken from Wales, because this Statute gives the King only a concurrent Jurisdiction to have the Criminal tried in the next English County at his Election, and the Reason is plain, for the Welchmen had usurped Privileges to which they had no manner of Right; therefore these Statutes shew, that they deserved Correction, and in the enacting Part all Wales is included as well as the Lordships Marchers; so likewise where 'tis said, that if Jurors in Wales (which Words include the Whole) did not act according to Evidence, they should be punished by the President and Judges by Fine, &c. which is such a severe Check upon Juries, that it would never have been enacted without some Piece of Injustice or Partiality notoriously known and represented to the Parliament in those Days.

'Tis admitted, that there is no Precedent in Point, for such Trials in an English County, but the Reason may be, because that Statute 34 & 35 H. 8. tells us, that the Laws were put in Execution; and for these Reasons by the Opinion of the whole Court, it was adjudged that this was a good Trial.

Whereupon the Court ordered, that the Prisoners should be brought up on another Day to receive Sentence, and accordingly they being brought to the Bar, it was moved in Arrest of Judgment, that the Court could not proceed to give Sentence, because by this Statute, that Power is given to the Judge of Assise who tried the Cause, and to him only; but upon reading the Statute, the Words were, (viz.) That the Prisoner should be tried and condemned, as if the Fact had been committed in the next English County; and certainly this Court might pass Sentence on a Criminal convicted in an English County.

So that Motion was over-ruled; and thereupon Sentence was given, and a Rule of Court was made to the Marshal of the King's Bench to execute the Prisoners on

See 1 Vent. 93. Friday the 5th Day of July, who accordingly did execute them at the common Gallows in the County of Surrey.

The King *verſus* Burnaby.

Certiorari not granted to remove an Indictment for Murder out of *Wales*.

UPON a Motion for a Certiorari to remove an Indictment for a Murder committed in Angleſea, upon an Affidavit, that the Proſecutor feared ſome Partiality in Wales; and therefore that it might be tried in the next Engliſh County, for the Defendant was bailed, and had made ſome valuable Preſents to the Gentlemen of that County, as the Proſecutor was informed by his Solicitor; thereupon a Rule was made for the Defendant to ſhew Cauſe why a Certiorari ſhould not go.

And at another Day it was ſhewed for Cauſe, that if Trials ſhould be removed out of Wales into the next Engliſh Counties upon ſuch incertain Allegations, there could never be any Trials there; and firſt, as to ſaying he was bailed, that could be no Reaſon for the Proſecutor to fear any Partiality; for the Defendant was bailable by Law, becauſe by the Coroner's Inqueſt, the Fact was only found Chance-Medley; and as to the Preſents made to the Gentlemen of the County, the Affidavit was only, that he was told ſo by his Solicitor, who probably might tell him what was falſe; therefore he ought to make a poſitive Oath of that Matter, otherwiſe a Certiorari ſhall not be granted.

Beſides, in this Caſe both the Priſoner and the deceaſed were Natives of Holland, and had no manner of Intereſt in Wales, ſo that there is no Colour to fear any Partiality, but that Juſtice will be equally diſtributed.

Curia. Where there is a juſt Reaſon to induce the Court to believe Partiality will be ſhewed on either Side, there the Indictment ſhall be removed into an Engliſh County; but the Truth of that Matter will be ſuſpected, where 'tis upon the Motion of either the Priſoner or Proſecutor, and in ſuch Caſe there muſt be a full and clear Affidavit to induce the Court to grant a Certiorari; but where 'tis at the Inſtance of the Attorney General in Behalf of the Crown, it ſhall be granted without an Affidavit; therefore this Rule ſhall be ſet aſide for Want of a ſufficient Affidavit; but the Proſecutor ſhall have Leave to move it again upon a better.

Belt *verſus* Collins.

A Writ of Error coram vobis reſiden. was brought on a Judgment given in B. R. and the Queſtion was, Whether it was a Superſedeas before it was allowed by the Court.

Writ of Error *coram vobis reſiden.* is a good *Superſedeas* after 'tis allowed.

It was argued, that it was not, becauſe this Writ was different from other Writs of Error, for 'tis only, that the Judges would review their own Judgment; and being ſued out of Time, 'tis no Superſedeas without Allowance by the Court in Term-time.

Neither is any other Writ of Error a Superſedeas before 'tis allowed, becauſe 'tis taken out of one Court to reverſe the Judgment of another; and he who takes it out may keep it in his Pocket without giving Notice, for which Reaſon it would be very inconvenient if ſuch a Writ of Error ſhould be a Superſedeas.

It was ſaid on the other Side, that this is as good a Superſedeas as if the Writ of Error had been ſued out in Term-time, for the Law hath not fixed any certain or determinate Time for ſuing out Writs of Error to reverſe the Judgments of this Court in the Exchequer-Chamber; but ſuch Writs are always allowed by the Secondary, as well out of Term as within; and a Motion was never yet made in this Court to allow a Writ of Error. Econtrà.

The Chief Juſtice and two other Judges were of Opinion, that it would be hard, that the Execution of a Judgment in this Court ſhould be delayed by a Writ of Error allowed by a Secondary; for if that ſhould be ſo, that any Man may avoid the Execution for a whole Vacation, at the Expence of no more than one Shilling. Curia.

There is certainly ſome Variance between a Writ of Error of a Judgment coram nobis reſiden. and other Writs of Error, for the one is directed to the Juſtices of this Court, and therefore ſhould be allowed by the Court; but the other is directed to the Chief Juſtice only.

But Juſtice Eyre was of another Opinion; he cited the Caſe of Lowns and Carter in the Chief Juſtice Holt's Time, where a Writ of Error was adjudged a Superſedeas before it was allowed.

'Tis true, there is a Difference between this Caſe and other Writs of Error, but the Reaſon is plain; for where Writs

of Error are brought in the Exchequer-Chamber, or in the House of Peers, to reverse the Judgments of this Court, they are always directed to the Chief Justice alone, because he is to certify the Record; but where a Writ of Error coram vobis residen. is brought, there is no Record certified.

Besides, there never yet was a Motion in a Court of Law to allow a Writ of Error, because 'tis a Writ of Right, and due to the Subject ex debito Justitiæ.

But admitting this Writ is no Supersedeas before the Allowance, yet 'tis a good Supersedeas after 'tis allowed, as this was by the Secondary, and before Notice; and so it was adjudged in the Case of * Smith *versus* Cave, in which Case an Execution executed was set aside; but the Want of Notice excused the Contempt.

* 3 Lev. 312. *See* Dyer 244. Poph. 132. 1 Vent. 207. 1 Mod. 112.

The King *versus The University of* Cambridge.

Mandamus to restore Dr. *Bentley* to the Degrees he had taken in the University.

MAndamus to the Vice-Chancellor, Masters, and Scholars of Cambridge, to restore Dr. Bentley to the Degrees to which he had been admitted by the University, and had been surreptitiously degraded (as was suggested) or that they should shew Cause why he should not be restored.

The Counsel for the University desired Time to shew Cause why a Mandamus should not go, for that there were several old Books and Charters which were necessary to be inspected before they could shew Cause; and thereupon the Time was enlarged for that Purpose.

And upon another Day it was argued for the University, that by Virtue of a Charter given to them by Queen Elizabeth, they had a Court of Judicature to try and determine all Matters arising within their Jurisdiction, in which Court a Plaint was levied by Dr. Middleton against Dr. Bentley, and thereupon a Summons was sent by the Beadle to the Doctor, which he received, and spoke contemptuous Words of the Court, for which he was degraded, and from which no Appeal would lie, no more than a Writ of Error would lie for imposing a Fine by a Temporal Court, for a Contempt, because every Court of Record is entrusted with the final Judgment of what shall be a Contempt to their Authority; therefore if an Appeal or a Writ of Error would lie in such Case, it would put the Trial of what is a Contempt

to the Diſcretion and Judgment of a ſuperior Court, and ſo ſtrip an inferior Court of that Power which they have by Law to judge what is a Contempt to them; whereas Contempts of the Authority of Courts are undoubtedly to be judged by the ſame Courts to whom the Contempt is offered, which is the Reaſon that a Writ of Error will not lie on a Sentence for a Contempt to this Court; but then it muſt be plainly proved.

Now the ſame Thing is done by a Mandamus after an indirect Manner, as would have been done by an Appeal or Writ of Error, if that would lie; but as an Appeal will not lie for a Contempt, ſo neither will a Mandamus; for admitting this Degradation had been ad libitum, yet a Temporal Court could not grant a Mandamus; 'tis like the Caſe of a Recorder of a Corporation who was removable at Will, and being diſplaced moved for a Mandamus, but it was denied.

Beſides the conſtant Courſe and Cuſtom of this Univerſity, warrants a diſcretionary Power amongſt them to confer Degrees on ſome, and to degrade others for any Contempt; and in this Caſe they have done all they could to bring Dr. Bentley to an eaſy Agreement; for after the firſt Summons they ſent another in Writing by their Beadle, but the Doctor's Doors were then ſhut, and he would not be ſeen; then they adjourned from Day to Day, on Purpoſe to give him Leave to appear, before they would ſuſpend him; but when he contemptuouſly declined, they firſt ſuſpended and afterwards degraded him.

Now, as a Mandamus was never yet granted to admit a Man to a Degree in the Univerſity, after he had performed all his Exerciſes, ſo there ought to be none to reſtore one after a Degradation, becauſe Degrees are arbitrarily given by the Univerſities, and ſo are Degradations arbitrarily made; for if they ſhould by any Means raſhly admit an unlearned Man to a Degree, they may upon better Information degrade him, without taking a Traverſe to the Return of a Mandamus, which muſt be tried by a Jury of Lay Freeholders.

Beſides theſe Degrees are but Titles of Honour and Precedency, and give no * temporal Right, and for that Reaſon a Mandamus ought not to go; for if a Knight ſhould be degraded in a Court of Honour, no Mandamus would lie to reſtore him, which is a Caſe in Point; therefore if it ſhould lie in this Caſe, it would introduce a new Method to evade the

* 1 Lev. 119.

the Privileges given by this Charter, which was afterwards confirmed by Parliament; and as it hath been formerly adjudged in Caſtle and Litchfield's Caſe, that a Certiorari or Writ of Error will not lie to correct a Judgment given for a Contempt; ſo no Mandamus ought to go, which is in Effect the ſame.

If it ſhould be objected, that his Degree doth qualify him for ſome temporal Employment, of which he would be incapable without it; now admitting that to be true, yet ſuch Employments are only conſequential, and not directly incident to his Degree, and therefore ought not to be regarded.

And if another Objection ſhould be made, (viz.) That the Doctor would have appeared by a Proctor, but was not allowed ſo to do; tho' this may be true, yet 'tis no Objection of Weight, becauſe it might not be the Courſe of their Court to admit ſuch Appearances, and the Univerſities have a Privilege to proceed according to their own Laws, as an Encouragement to Learning; and if they have proceeded accordingly, this Court will not interpoſe.

Now, take the Caſe as it ſtands upon Dr. Bentley's Affidavit, there will be no Reaſon to grant a Mandamus, for he makes Oath, that he hath appealed from the Sentence of the Univerſity Court; which, if true, then there is another Remedy for him to be reſtored, (viz.) By an Appeal; and where there is another Remedy, a Mandamus is never granted.

Moreover the Doctor made Oath, that the Univerſity had no Power to degrade him, if ſo, then he is not degraded for Want of a ſufficient Power ſo to do, and conſequently a Mandamus ought not to go, for 'tis impoſſible that a Man ſhould be reſtored to his Degree who was never degraded.

Econtra. But on the other Side it was ſaid, that the Merits of this Cauſe ought not to be argued upon a Motion, but upon the Return of the Mandamus, and for that Reaſon it ought to be granted.

Curia. All Care ſhall be taken, that Juſtice ſhall be duly adminiſtered in the Univerſities; but if they aſſume an arbitrary Power exempt from the Juriſdiction of any other Court of Judicature, then they may do what they pleaſe without Control; and where People are under ſuch a Government, they are in a very bad Condition.

But this Court hath a greater Regard to the Learning of the Univerſities, than to admit the arbitrary Sentence of a Vice-Chancellor to be final.

As to what hath been ſaid, that the Degrees in the Univerſities are only Honorary; this is a Miſtake, for they are blended with a temporal Right ſo far as to deſerve a Mandamus to reſtore a Man degraded; 'tis true, this might have been a proper Objection before the Statutes of H. 8. and Car. 2. were made, which render a Man incapable of a Benefice, if he had not taken his Degrees in ſome Univerſity; for before thoſe Statutes, ſuch Degrees were only Titles of Precedency, and the Allowing them, or a Degradation was no temporal Advantage or Loſs; therefore in ſuch Caſe the Temporal Courts had no Reaſon to interpoſe; and this may be the Reaſon why the Univerſities degraded ad libitum, and of their conſtant Courſe ſo to do.

But this is no Objection ſince the making thoſe Statutes, neither ſhall it be ſaid, that where a Corporation hath admitted a Man willingly to his Freedom, that they ſhall have Power to diſfranchiſe him, becauſe they do not like him; neither can the Univerſities give Degrees to whom they pleaſe, and take them away ad libitum; and tho' their Counſel have objected againſt this Mandamus, for that they have an exempt and abſolute Juriſdiction amongſt themſelves; this ſeems to be a good Reaſon why it ſhould be granted, tho' it might have been otherwiſe if they had ſhewed, that they had a Viſitor to whom an Appeal would lie; for probably that might have excluded the Superintendency of this Court, but to deny a Degree to him who had performed all his Exerciſes to qualify him for a Degree, would be a great Diſcouragement to Learning, and in ſuch Caſe this Court would grant a Mandamus to admit him, eſpecially ſince 'tis accompanied with a temporal Intereſt.

Now admitting it ſhould be enacted by ſome Statute, that a Man ſhould be incapable of ſuch an Office, if he was not a Knight, ſhould not a Knight degraded have a Mandamus, certainly he ſhould, and ſo had Dr. Bentley in this Caſe.

After the Mandamus was granted, the Univerſity made this Return, ſ. That the Chancellor, Maſters and Scholars of the Univerſity of Cambridge were Time out of Mind a Body politick, and had Power to give Degrees, and to degrade any reſident Graduates, for a Contempt or any other reaſonable Cauſe; and that they have a Court of Juſtice for all thoſe who belonged to the Univerſity, which was granted to them by Queen Elizabeth, and had Power to hold, judge and determine all Pleas ariſing within the Univerſity, which were afterwards to be allowed by a Judge of Aſſiſe, &c. that the ſaid Grant, by which they enjoyed this Privilege, was confirmed

The Return of the *Mandamus*.

firmed by Act of Parliament made Anno 6. of that Queen's Reign; that Dr. Coniers Middleton levied a Plaint in the said Court against Dr. Bentley, &c. and thereupon Process issued against him according to the Course of the University directed to Edward Clerke their Beadle to Summon him to appear at the next Court, which Process the said Dr. Bentley took from the said Beadle, and contemptuously said the Vice-Chancellor * acted foolishy; and that he was not his Judge, and that he would not obey it, that the Process was illegal, and against Law, and that he spoke other contemptous Words of them; That at the next Court Dr. Middleton declared for a Debt due to him, and that Depositions were made by the Beadle de contemptu prædicto; that thereupon the Vice-Chancellor suspended him for this Contempt; that afterwards upon a Grace proposed to a Congregation of Doctors and Heads of Houses by the said Vice-Chancellor, he by the Advice and Consent of seven other Doctors of the University was degraded, and that Time out of Mind, the University had Power to suspend or degrade for any Contempt to them; which Power was confirmed by Charter, and ratified and affirmed in Parliament, &c.

* In the Return it was *Stulte agit.*

The Argument against the Return.

It was objected against this Return in general, that admitting the Vice-Chancellor, Masters and Scholars had a Power of giving Degrees, and of suspending and degrading for reasonable Causes; yet that Power must be under the Inspection of this Court, unless they can shew some good Cause to exclude it.

Now by this Return they do not pretend, that any Appeal did lie to a proper Visitor, but have absolutely excluded all visitatorial Inspection, so that by their own Shewing they are subject to the Jurisdiction of this Court, as all other Corporations are.

Besides, every Man who is admitted to a Degree in the University hath a Freehold for Life, of which several Statutes take Notice; as for Instance, the Statute † 21 H. 8. enacts, that the several Persons therein named, and who are admitted to Degrees in either of our Universities, and not by Grace only may purchase a Dispensation to keep two Benefices with Cure, &c. which Benefices are for Life.

† 21 H. 8. cap. 13.

So by the Statute 17 Car. 2. 'tis enacted, That the Incumbents of Churches united must be Graduates in one of our Universities, which Union is likewise for Life, and no Persons are capable of such Benefices but Graduates.

17 Car. 2. cap. 3.

Therefore this Court will take Notice of such Degrees as entitling the Graduates to some temporal Right; and if so,

then the Queſtion will be on this Return, whether the Sentence given in the Vice-Chancellor's Court is legal, or not.

'Tis admitted, that the Doctor was guilty of a Contempt, for which they might have puniſhed him, if they had proceeded in a right Method; but 'tis certainly wrong to take away a Man's Freehold by any other Means than per legem terræ.

Then as to the Return it ſelf, it appears, that there were four Cauſes to ſuſpend the Doctor.

(1.) In ſaying that the Vice-Chancellor acted raſhly, for ſtulte agit implies raſhly as well as fooliſhly, and in the Return ſhall be taken in mitiori ſenſu.

(2.) In ſaying that the Vice-Chancellor was not his Judge.

(3.) By taking the Proceſs from the Beadle.

(4.) In ſaying that the Proceſs was illegal.

But they do not return any Cuſtom of ſuſpending or degrading; tho' if they had, it had been void, if it was unreaſonable, as it was held in the Caſe of the City of London, that an unreaſonable Cuſtom, tho' confirmed by Act of Parliament is void.

Neither do they ſet forth what Puniſhment is to be inflicted for a Contempt, in Caſe the Offender had not been a Graduate.

Then they ſay, that the Depoſitions for this Contumacy were exhibited by the Beadle, &c. now by Reaſon of this haſty Judgment, thoſe Depoſitions ought to be very plain; but it doth not appear, that they were taken before a proper Magiſtrate who had Power to tender an Oath, but only that they were taken de contemptu prædicto.

Now the Word Depoſition doth not ex vi termini imply, that it was taken on Oath, for 'tis a * relative Word, and denotes no Charge; and it doth not appear, but that it might be taken to clear him of a Contempt, and Convictions are daily quaſhed for ſuch Faults where they fix no Crime on the Convicted; now if they had returned before whom the Depoſitions were taken, it might have appeared to be before one who had no Power to take them.

* Yel. 122. Latch. 39.

Another Part of the Return was, that the Power of conferring Degrees is in the Vice-Chancellor, Maſters and Scholars, and ſo is the Power of ſuſpending and degrading; therefore of their own Shewing the Vice-Chancellor's Court hath no ſuch Power; 'tis like a Corporation which hath Power to remove a Freeman, but if he is removed by a Court of a Corporation, 'tis illegal.

By the Law of England, a Man cannot be twice puniſhed for the ſame Offence, but here the Doctor was twice puniſhed for this Contempt; firſt he was ſuſpended by the Vice-Chancellor's Court, and afterwards upon a Grace propoſed to a Congregation of Doctors and Heads of Houſes by the ſaid Vice-Chancellor, he by the Advice and Conſent of ſeven other Doctors of the Univerſity was degraded; which is a double Puniſhment; for how can that Congregation take Notice of the Suſpenſion, it not coming before them, either by Writ of Error or Appeal, ſo that it was an extrajudicial Cauſe, and in a very extraordinary Manner, and cannot be a Confirmation of the firſt Sentence; but a ſecond Puniſhment independent of the firſt, which was the Suſpenſion, and that alſo for the ſame Crime, ſo that 'tis wrong and unjuſt.

Beſides, of their own Shewing that Court and that Congregation had only a Juriſdiction over thoſe who reſide in the Univerſity; and therefore the Doctor could not be ſuſpended, unleſs he reſided there, which for ought appears muſt be taken by Intendment, for 'tis no where expreſly alledged, that he did reſide there; neither do they ſhew to whom the Contempt was, unleſs it ſhall be intended to that Court who ſent the Summons.

'Tis likewiſe returned, that a Proceſs iſſued to ſummon Dr. Bentley to appear at the next Court, but they do not ſhew the Nature of this Proceſs, whether it was by Arreſt, Diſtreſs, or Summons, which ought to have been ſet forth; neither do they ſhew where or when the next Court was to kept, or for what Cauſe he ſhould appear there; neither is it alledged, that he had Notice of either, or that he was in Contempt; for if theſe Things had been ſet forth, the Doctor might have an Opportunity to defend his Freehold.

1 Vent. 182.

* 2 Cro. Clerke's *Caſe*, 314. 1 Vent. 273, 352. 2 Cro. 105. 1 Roll. 484. 6 Rep. 54. † 11 Rep. 97. 1 Sid. 14. 2 Sid. 98. Stile 446. 9 Ed. 4. 14. 11 Rep. Bagg's *Caſe*.

How can a Man be ſaid to be contumacious to a Court when he did not know * when, and where they aſſembled as a Court; now as to that Matter, 'tis a conſtant Rule in all Caſes where a Mandamus is granted, that the Party ſhould have † Notice of his Charge; but it doth not appear by this Return, that the Doctor was ſummoned to anſwer for a Contempt, ſo that he was ſentenced without being heard, which is illegal, and againſt natural Juſtice as may appear by the Caſes in the Margin.

1 Sid. 14. 2 Sid. 94. Stile 442, 443. 4 Mod. 37.

But if all the Cauſes returned were true, yet none of them are ſufficient either to ſuſpend or degrade the Doctor, becauſe a Suſpenſion by their own Shewing, muſt be for ſome reaſonable Cauſe; now they do not ſet forth that a Contempt to this Court was a reaſonable Cauſe to ſuſpend the Doctor;

'tis true, they have alledged a Power Time out of Mind to ſuſpend and degrade; now this muſt be by Cuſtom, for they do not pretend to any Juriſdiction by the Civil Law; now all Cuſtoms in England are prima facie to be intended at Common Law, unleſs ſpecially ſet forth to be otherwiſe, and they muſt have a reaſonable Commencement, otherwiſe they are not good; but this Cuſtom is unreaſonable and inconſiſtent with the Common Law, it being of a Power to ſuſpend and degrade at Pleaſure; and 'tis not ſufficient to ſhew, that they had a Juriſdiction of the Cauſe, for that would deſtroy all Manner of Right, becauſe, if it ſhould be allowed, then every Corporation might ſhew that they had a Power to remove, or diſfranchiſe any Member thereof, and give no Account of the Cauſe of ſuch Removal or Diſfranchiſement; but the conſtant Practice in ſuch Caſes is otherwiſe, therefore they ought to have ſet forth in this Return, that the Contempt was a reaſonable Cauſe of Suſpenſion.

Upon the whole Matter, where-ever a Man loſes any Thing depending on a Freehold, a Mandamus will lie, if he hath no other Remedy; it was granted to a Presbyterian Parſon, and directed to a Juſtice of Peace, to admit him to take the Oaths and ſubſcribe the Teſt, that he might be entitled by Law to preach in his Congregation, and therefore a peremptory Mandamus was prayed. *Mandamus*, where it will lie.

It was argued for the Univerſity, and to maintain the Return, that there was nothing in this Caſe but what was uſual in Caſes of this Nature, for as in the Courts of Common Law, if the Defendant refuſe to appear upon Proceſs of thoſe Courts iſſued out againſt him, then he is to be outlawed; and if 'tis out of the Spiritual Courts, then he is excommunicated; ſo in theſe Courts of Univerſities, a Suſpenſion or Degradation is the only Method to enforce an Obedience to their Authority; and tho' they proceed in a different Manner from the Courſe of the Common Law, yet, if 'tis warranted by any other Law, or by the allowed Uſage amongſt them, 'tis good. Econtra.

Now this Method of Proceeding is allowed in all the Univerſities in Europe, and as they have a Power to ſuſpend, ſo likewiſe they have a Power to reſtore the Perſon ſuſpended, upon his Submiſſion; and by the Charter granted to this Univerſity by Queen Elizabeth, they have a particular Power to determine all Cauſes ariſing within their Juriſdiction.

It hath been alledged on the other Side before this Mandamus was granted, that Degrees in the Univerſities are only Titles of Honour, and given as the Rewards of Learning

and Merit; now, allowing this to be true, 'tis certainly a very ſtrange Inference to ſay, that the Perſons to whom ſuch Degrees are given, cannot therefore loſe them for a Contempt, or any other Demerit.

Beſides, theſe Degrees are given by the Univerſity, under a tacit Condition, that the Graduates ſhall conform themſelves to the Rules and Uſages there, and for that Reaſon 'tis no Novelty to proceed againſt them for Diſobedience to thoſe Rules, but warranted by the conſtant Practice in all Univerſities here and abroad.

Now, To anſwer the Objections made againſt this Return; firſt, it was ſaid, that it doth not appear that there was any reaſonable Cauſe for this Suſpenſion, nor how the Proceſs iſſued.

Anſw. In Anſwer to this Objection it plainly appears, that there was a Plaint levied in the Court againſt Dr. Bentley, according to the Cuſtom of the Univerſity, and that according to ſuch Cuſtom, Proceſs iſſued againſt him, which muſt be a Citation, becauſe that is the firſt Proceſs in all Eccleſiaſtical Courts, or in Caſes where the Proceedings are according to the Courſe of the Civil Law, which is the Law generally uſed in all Univerſities.

'Tis true, there were Caſes cited on the other Side, which prove, that the Proceſs muſt contain the Day when, and the Place where the Court is to be held, and likewiſe the Cauſe of Action; all which were omitted in this Proceſs; the Reaſon is, becauſe this was a Proceſs according to the Civil Law, wherein ſuch Certainty is not required, as if it had been a Proceſs at Common Law, by which the Time and Place of holding the Court muſt be aſcertained; but where the Time is incertain, as 'tis in all inferior Courts, (viz.) when they are to be held; there is no Occaſion of mentioning the Day in the Proceſs, becauſe the Perſon ſummoned muſt take Notice himſelf when the Court is to be kept.

Dyer 162. 1 Roll. 484. 2 Cro. 314, 572. 2 Bulſt. 36. Cro. Car. 254. Shower 85, 95.

As to that Objection, that it doth not appear that the Depoſitions exhibited by the Beadle to prove the Contempt, were taken by a proper Magiſtrate, upon Oath, who had Power to adminiſter ſuch Oath.

Anſw. This might be a proper Objection, if the Proceedings had been likewiſe at Common Law; but an Oath in ſuch Caſes is not required by the Civil Law, becauſe by that Law 'tis ſufficient to ſay, that it was done ex relatione appellantis; and 'tis what frequently happens, even in Courts of Common Law, to order a Man into Cuſtody for ſpeaking con-

contemptuous Words of such Courts, upon an Affidavit made, that the Party was summoned, &c.

Obj. As to that Objection, (viz.) That the Cause of Action is not set forth in the Return for which the Doctor was to appear.

Answ. One would think, that he who made this Objection had not read the Return, because it plainly sets forth, that a Plaint was levied by Dr. Middleton against the said Dr. Bentley, and Process issued against him to appear, &c. and that Dr. Middleton declared for his Debt, &c.

Obj. and Answ. And as to that Objection, that there was not any Contempt set forth, the contrary is certainly true; for 'tis returned, that the Doctor took the Process from the Beadle, which is a Contempt; and this appears by a Statute of the other University of Oxford, which is, that if any Person shall take the Vice-Chancellor's Writ from the Beadle, he shall be degraded, if a Graduate; and if not a Graduate, then he shall be otherwise punished, by which it appears, that University took it to be a Contempt, to have their Process taken from a Beadle.

'Tis true, it doth not appear by this Return in express Words, that it was taken from him by Violence, or that it was not restored; but the Words De manibus summonitoris abstulit, imply a Taking by Violence and Force.

Besides, It appears by this Return, that the Doctor said he would not obey the Summons, and that the Vice-Chancellor acted foolishly, and that he was not his Judge, which being spoken to the Beadle, is certainly a Contempt; for if the Doctor had any Thing to shew why the Vice-Chancellor had no Jurisdiction, he ought (as the Law directs) to have appeared and shewed the Cause, and not to tell it to the Beadle, to bring their Court and their Proceedings into the Contempt of the Vulgar.

Obj. It hath been farther objected, that if the Day and Place of holding this Court had been set forth, and Notice likewise given to the Doctor to appear and answer a Contempt, he might then have an Opportunity of appearing and clearing himself from that Charge; but those Things being omitted in the Return, he could have no such Opportunity.

Answ. In the Return 'tis plain, that he was summoned to appear at the next Court, and that for not appearing he was suspended, which is a full Answer to that Objection; but the Suspension had been good, tho' the Doctor had never been summoned.

'Tis

'Tis true, 'tis againſt natural Juſtice to puniſh a Man without hearing him; but 'tis a miſtaken Method of arguing to apply general Rules to particular Caſes; for 'tis ſufficient if the Doctor had an Opportunity to be heard, and that is not denied, but 'tis plain, that he would not be heard, for he ſpoke contemptuous Words of that Court, where he ſhould be heard; and therefore ſince he deſpiſed their Authority, there was no Occaſion for a ſecond Summons to anſwer the Contempt; for the Rule is * contra veram contumaciam non amplius eſt avocandus.

* 2 Salk.

Now where the Civil Law is the Rule and the Guide of the Court, and they proceed according to that Law; the Courts in Weſtminſter-Hall always give Credit to ſuch Proceedings, otherwiſe it might be of very bad Conſequence to have an inferior Court proceed by one Law, and to have the Sentence of ſuch Court reverſed by a ſuperior Court where the Proceedings are by another Method, and by another Law.

The Sentence given againſt the Doctor is not ſo very ſevere as it hath been repreſented, becauſe upon his Submiſſion or clearing himſelf of the Contempt, he might be reſtored to his Degrees at any Time; and this Degradation which is only a Means to enforce his Obedience would be quaſhed, ſo that 'tis his own Fault and Obſtinacy if he is not reſtored.

It hath been ſaid on the other Side, that a Diſfranchiſement of a Freeman for a Contempt to the Mayor's Court was never yet ſeen, which is very true; but theſe Caſes are far different from Degradations, becauſe where a Member of a Corporation is diſfranchiſed, he is ſecluded from all Privileges of that Corporation, and the reſt of the corporate Body are deprived of their Intereſt in him, and of his Voting in any corporate Act; but 'tis otherwiſe in the Caſe of a Degradation, becauſe the Perſon degraded is ſtill a Member of the Univerſity (for ſo is the Doctor in this Caſe) who is ſtill Head of a College; 'tis true, this Degradation is a perſonal Reflexion on him, and he is thereby deprived of ſome Benefits ariſing from his Degrees in this Univerſity, but he is ſtill a Member thereof.

All that was done as to his Degradation was ſecundum leges & conſuetudines Univerſitatis, who have a Power finally to determine in ſuch Caſes; yet that doth not exclude other Powers to inſpect their Actions; but if they proceed according to their known Laws and Cuſtoms, tho' a little different from

from the Common Law, this Court will give Credit to their Proceedings, and not interpose.

Now in this Case they proceeded according to the Laws and Customs of the University; for the Vice-Chancellor's Court hath Cognisance of all personal Actions arising there, and where any of the Members thereof are concerned, (excepting Felonies) and this is an independent Jurisdiction exclusive of all others Time out of Mind, and confirmed by Act of Parliament, any Law, Custom, Statute or Constitution notwithstanding; and this is purely to give them Leave to proceed according to the Civil Law.

'Tis true, my Lord Chief Justice Hale in his History of the Common Law, tells us, that the King cannot give Power by his Charter to set up any Jurisdiction to proceed by any other Means than the Common Law; which shews, that tho' he cannot do it by Charter, yet it may be done by Act of Parliament, as it was done in this Case on Purpose that they might proceed by the Civil Law; therefore this Court will not interpose to examine their Proceedings, whether they are right or not, because that Court proceeds by a different Law, (viz) by the Civil Law, and they have returned, that the Doctor was suspended according to the Customs of the University, so that this Suspension must be according to the Civil Law.

Obj. As to the Objection, that no particular Custom is returned, for the Vice-Chancellor's Court either to suspend or degrade, and that those were Punishments not adequate to the Crime, which was only a Contempt.

Answ. The Answer is, that it plainly appears to be otherwise by the Civil Law, which is to be the Measure of the Punishment in this Case.

Obj. It hath been likewise objected, that those Degrees confer a temporal Right on those to whom they are granted.

Answ. 'Tis true, those Degrees are granted by Virtue of a Power given by the Crown, as all other Honours and Precedencies are; and the Granting them is but the Disposition or Order of the Precedency included in that Liberty given by the Crown in founding a College, like a Corporation which likewise is founded by Virtue of the King's Grant.

Now all collateral Qualities tacked by the Parliament to those Degrees, do not alter the Power of the Universities to dispose them as Matters of Precedency, nor alter the Nature of those very Degrees; as if an Act of Parliament should be made, that no Person should be capable of such Benefices, but those who were bred at one of the Schools at Eaton or West-

Weſtminſter, would ſuch a Statute make any Alteration in the Diſcipline of thoſe Schools, but that ſtill they might give Precedency to one Scholar before another, without the Interpoſition of this Court; and the Univerſity it ſelf is but one great School, (viz.) Schola illuſtris.

The Caſe of Holy Orders is ſtill of a higher Nature, and in Conſequence thereof hath a greater temporal Right; yet that Right may be taken away by a Sentence in another Court, and not ſubject to the Control of this or of any other temporal Court; as for Inſtance, the * Biſhop of St. Davids was degraded in the Spiritual Court for Simony, and in Conſequence of ſuch Degradation loſt his Barony, but this Court would not interpoſe.

1 Salk. 106, 134, 294.

So likewiſe where any Perſon is excommunicated, or where a Chancellor grants a Sequeſtration to enforce an Obedience to the Eccleſiaſtical Law, no Prohibitions or Certiorari's will lie.

So a Feme-Covert may ſue in the Spiritual Court without her Husband, and this being allowed by their Law, this Court will not interpoſe; ſo Juſtices of Peace have Power by ſeveral Statutes finaliter determinare, and that in a ſummary Way and Method different from the Common Law, and this Court will give Credit to their Proceedings, if they act accordingly.

Now this Suſpenſion is no more than an Amotion by Virtue of a Clauſe in their Charter; ſo that if the Cauſe was within their Juriſdiction, a Mandamus cannot be granted for any Irregularity, for that is altogether out of the Caſe, becauſe this Court is not to enquire thereof, where the Cauſe is within the Juriſdiction of the Civil Law; and therefore Anno 12 Will. this Court would not interpoſe in Dr. Groenvelt's Caſe, who was fined and impriſoned by the College of Phyſicians, they having Power by a Statute ſo to do.

1 Roll. Abr. 530. 1 Sid. 72. Raym. 3. 1 Lev. 267. 4 Mod. 160.

If a Man is excommunicated who was never cited, this Court will not grant a Prohibition; ſo if Juſtices of Peace make an Order without ſummoning the Party, they ſhall not be prohibited, if they had an Authority by ſome Statute to proceed without any Prohibition or Certiorari.

Obj. It hath been objected, that this Suſpenſion is no more than an Amotion by a Corporation in common Caſes, ſo it could not be done by the Vice-Chancellor's Court, no more than a Man can be removed by a Court of a Corporation.

But this Objection is wrong, for where the Body of the Univerſity are Judges, as in this Caſe, there the Vice-Chancellor is only their locum tenens in order to execute Juſtice;

and the Univerſity is active in him, who hath a delegated Power to hold Courts before the whole Body, and a Part is implied to be acted by the whole corporate Body by their Law, as the Graviores cauſæ, ſuch as Granting Degrees or Depriving; and 'tis ſet forth, that their Court hath Power to ſuſpend or deprive, and to reſtore upon Submiſſion; but when the Doctor hath contemned that Court, they may certainly ſuſpend him without a ſecond Summons, eſpecially ſince the Contempt was to that Court, by which he was ſuſpended.

It was objected, that he hath no Remedy but by a Mandamus, for tho' he might be willing to ſubmit, yet the Vice-Chancellor might never call a Court, and 'tis wholly in his Power not to call one.

Now as to that Matter there is a conſtant Call of two ſuch Courts every Year; beſides, 'tis in his Power upon extraordinary Caſes to call a Convocation at any other Time; and this appears in the very Return, but if it had not been ſet forth, 'tis implied by the Courſe of the Civil Law; for by that Law all Puniſhments for Contumacy are from the Nature of them temporary, tho' impoſed in general Terms; ſo that this Univerſity hath proceeded as uſual, and as all other Univerſities in Chriſtendom; and 'tis neceſſary in ſuch Caſes to uſe ſome extraordinary Juriſdiction where young Perſons meet together from all Places in the moſt unruly Part of their Lives; otherwiſe it would be of very ill Conſequence, if the Governors could not enforce an Obedience without being ſubject to the Control of this Court.

Upon the whole Matter, the Doctor knows, that he is degraded, and for what Cauſe, and he ought to have made his Submiſſion before he moved for a Mandamus, and if that had been done, he might have no Occaſion to apply himſelf to this Court.

This is a Caſe of great Conſequence, both as to the Property, Honour and Learning of this Univerſity, and concerns every Graduate there, though at preſent 'tis the Caſe only of one learned Man, and the Head of a College. Curia.

The Queſtion is, Whether the Univerſity can ſuſpend and degrade, and by what Rules they may proceed in either, or both of theſe Caſes, and as to this Matter, 'tis allowed they may ſuſpend or degrade for a reaſonable Cauſe, but then the Cauſe muſt be ſpecially ſet forth, that the Court may judge whether 'tis reaſonable, and according to Law.

'Tis agreeable to Law, that a Man shall not be deprived of his Property without being heard, unless 'tis by his own Default; but 'tis hard, that it should be in the Power of one Man to suspend or degrade another, without any Appeal; for if he should err (as all Men are subject to Errors) then the Person suspended or degraded hath no Remedy.

'Tis allowed, that this University hath a Jurisdiction in several Cases, and this Court will support them in the Exercise of such Jurisdiction, if they do not exceed their proper Bounds and Limits.

Now as to the Return, there are several Causes set forth both for the Suspension and Degradation, (viz.) In saying, that he would not obey the Summons, that it was illegal, that the Vice-Chancellor *stulte agit*, and that he was not his Judge, and all this spoken to a Beadle who served the Process of their Court, and in a very indecent Manner, in Diminution of the Authority thereof, and to make it ridiculous, which is consequently a Contempt thereof; and if the like had been done to an Officer of this Court, it would have been accounted a great Indignity, and the Person should be punished; but then the Matter must be brought before the Court in a proper Manner, and whether that was done in this Case is now to be determined.

Now by this Return it appears, that Depositions for a Contempt were exhibited by the Beadle, but it doth not shew, that those Depositions were taken before a proper Judge; and this being the Foundation of the Degradation, it doth not appear to this Court, that they had any Power to degrade the Doctor.

But, admitting they had such a Power, then the next Thing to be considered on this Return is, Whether the Cause returned is sufficient to justify this Degradation; and if it was, then whether it was well returned.

Now the Cause returned is, that he was degraded for a Contempt in saying the Process was illegal, and that he would not appear, &c. but 'tis not set forth, that he did not appear; besides, admitting it to be a Contempt, there are other proper Means of punishing the Person, and those are by binding him to his good Behaviour, or by fining him, and not by degrading, because by that Means they deprive him of his Freehold, which ought not to be but per legem terræ.

They

They return, that they had Power to degrade for a Contempt, and this was given to them by a Charter of Queen Elizabeth, and for any other reasonable Cause; now the Cause returned was neither, for it was not a Contempt to the University, but to the Vice-Chancellor's Court; 'tis like a Contempt to a Mayor, which can never be said to be a Contempt to the whole Corporation; therefore, tho' they might degrade for a Contempt to the University, it cannot be inferred from thence, that they may degrade for a Contempt to a private Court of that University.

It was never seen, that a Member of a Corporation was disfranchised for a Contempt to a Mayor's Court, or that a Copyhold Tenant forfeited his Estate for a Contempt to the Lord of a Manor; and there is no Difference between this University and other Corporations, as to their Civil Rights.

And tho' it hath been said, that a Degree in the University is but a Title of Honour and Precedence, yet 'tis a Degree which gives a Man Credit in the World, and an Interest in the Lands of the Incorporation, and a Vote in every Act of the corporate Body, and a Prospect of several other Benefits out of the Corporation; so that though 'tis titular, yet in the Consequence there are several Civil Rights which attend it; and a Man who hath taken such Degree hath a Freehold.

Besides, where any Person is degraded for a Contumacy, it ought to be by that Court to whom the Contempt was offered, but 'tis not pretended by this Return, that the Vice-Chancellor's Court had any Power to degrade.

Neither doth it appear that Dr. Bentley was ever summoned to answer this Contempt; and 'tis against natural Justice to deprive a Man of his Right before he is heard; therefore if there was a Custom so to do, such Custom would be absolutely void; and 'tis a Thing of daily Experience to grant Prohibitions to Spiritual Courts, if they deny the Defendants a Copy of the Libel, because such Denial is against natural Justice; and now to offer a common Instance, (viz.) Suppose an Officer of this Court should shew any Contempt thereof, could he be deprived of his Office for such Contempt? Certainly he could not.

'Tis true, they who have argued for the University, insisted, that the Proceedings there are according to the Civil Law, and this they have done to justify the Suspension, without being summoned to answer the Contempt; but it doth not appear upon the Return (upon which this Court is

to judge), that they proceed there by the Civil Law; and if so, then the Court must intend that they proceed by the Common Law, which they have not done, for there is no Manner of Proof that the Doctor was summoned to appear to answer the Contempt; and it can never be said, that a Court which proceeds according to the Common Law, shall suspend or degrade a Person without being heard or summoned.

'Tis said likewise, that this was not a Proceeding by Virtue of a Charter alone, but by a Charter confirmed by Act of Parliament; now admitting that to be true, it must be granted, that Convictions, even upon Acts of Parliament, are frequently quashed, for not summoning the Persons convicted, though not required by the Statute, because 'tis still against natural Justice to convict without Hearing.

Lastly, Admitting the University hath a Jurisdiction, yet this Court will inquire what they have done, and how they have used that Jurisdiction, as it was done in * Bushel's Case, where it was insisted, that the Merits of the Cause could not be inquired into upon the Return of an Habeas Corpus, but it was over-ruled; and this Court cannot affirm the Proceedings in this Case, without over-ruling Bushel's Case, and several other Authorities of the like Nature.

* Vaughan Rep.

For which Reasons the Court was unanimous in granting a peremptory Mandamus; and in the next Term the Doctor was restored to his Degree.

Anonymus.

Two indicted for Murder, and one acquitted.

ff. AT the Sessions in the Old Baily held there 9 Aprilis, 9 Georgii, where some of the Judges of the Common Pleas were present, this Case happened:

ff. Two Men were beating another Man in the Street, and in the Night-time, and a Stranger passing by at the same Time, said, He was ashamed to see two Men beat one; thereupon one of those who was beating the other, ran to the Stranger in a furious Manner, and with a Knife which he held in his right Hand, gave him a deep Wound, of which he died soon after; and now both the other were indicted as Principals for the said Murder, but the Judges were of Opinion, that because it did not appear that one of them intended any Injury to the Person killed, he could not be guilty of his Death, either as Principal or Accessary; 'tis

true, they were both doing an unlawful Act, but the Death of the Party did not enſue upon that Act; ſo he was acquitted and the other was found guilty; and this agrees with the Caſe of The * King and Thomas. Kelynge Rep.

At the ſame Seſſions another Man was indicted on the Statute 10 & 11 Will. 3. For Stealing a Shirt out of a Shop, by which Statute 'tis enacted, That any Perſon, who by Night or Day, ſhall, in any Shop, Ware-houſe, Coach-houſe or Stable, privately and feloniouſly ſteal any Goods of the Value of 5 s. or more, tho' ſuch Shop, *&c.* be not broke open, and tho' the Owner, or any other Perſon be, or be not in ſuch Shop, or that ſhall aſſiſt in committing ſuch Offence, being thereof convicted, ſhall not have the Benefit of the Clergy. 10 & 11 W. 3. cap. 3. The Goods of another ſtolen out of a Shop is not Felony within that Statute.

Now the Caſe was thus, (viz.) A Shirt which was the Property of T. S. was left in the Shop of W. R. to be ſent to a Seamſtreſs to mend it, and was ſtolen by the Priſoner out of the ſaid Shop; the Queſtion was, Whether this was Felony within the aforeſaid Statute, for which the Offender could not have the Benefit of Clergy; and the Judges were of Opinion, that it was not, for the Statute was made as a Remedy for the Owners of Shops to preſerve their own Goods, which might be left there by Way of Trade, but did not extend to Goods caſually loſt there, and conſequently the Stealing ſuch Goods to the Value of 5 s. was not Felony without Benefit of Clergy; and the Jury gave a Verdict accordingly.

The King *verſus* Powell *and others.*

A Rule was made on the Defendant Powell and one Jones, to ſhew Cauſe why an Information in Nature of a Quo Warranto ſhould not go againſt them to ſhew by what Authority they claimed to be capital Burgeſſes of the Borough of Brecknock, *&c.* and the like Rule on Mr. Price, to ſhew by what Authority he claimed to be Recorder of that Borough. Information in Nature of a *Quo Warranto*, to ſhew Cauſe why he claimed to be a capital Burgeſs.

It was objected againſt the capital Burgeſſes, that they were never duly choſen Burgeſſes, and by Conſequence could not be capital Burgeſſes.

Now, admitting that Matter to be true, yet Powell being a Burgeſs de facto ever ſince the Year 1708, and Jones being another

another such Burgess ever since the Year 1712, it would be of fatal Consequence to this Borough, after so long an Acquiescence, to make all the corporate Acts done by them during all that Time, void.

And probably these Men may be pursued a little farther, for the next Step may be, Whether they were ever admitted to their Freedom, or whether they served seven Years Apprenticeship, which Things may be very hard to prove upon a Quo Warranto.

As to the Recorder, he was elected 29 April, 1722, but finding that Election was not good, he was re-elected the 20th of May following, and before he was sworn into the Office; so that there is no Colour to extend this Rule to him.

Econtra. The long Acquiescence, as suggested on the other Side, can be no Colour against this Rule, which was made on the meer Right; and it seems a little surprising, that it should be offered against the Rule, because Length of Time will never establish a Right which was gained by Usurpation.

Now 'tis plain, that these Men could never be capital if they never were legal Burgesses; 'tis true, in Cases of not Taking the Sacrament, or the Oaths of Allegiance and Supremacy, the Court will intend that they were duly taken after a long Acquiescence; but a Right shall never be intended when the Merits of it are controverted (as 'tis in this Case), and no collateral Part disputed.

Curia. And the Court being of that Opinion, the Rule was made absolute as to the capital Burgesses, but discharged as to the Recorder, because he did not rely on his First, but on his last Election.

Lilly *versus* Hodges.

Covenant by Two, the Action may be brought by One.

THE Case was: ſſ. The Defendant and one Griffith covenanted to receive the Rents due to the Plaintiff Lilly and one Cardonel in Ireland, and likewise that they and each of them would pay a Moiety thereof to each of them, the Plaintiff and Cardonel.

And now in an Action of Covenant brought against the Defendant Hodges alone, by the Plaintiff Lilly, for his Moiety; the Breach assigned was against both the Covenantors, (viz.) That neither the Defendant Hodges, or the other Covenantor Griffith, had not paid the said Moiety to the

Plaintiff Lilly; and upon the general Iſſue pleaded, the Plaintiff had a Verdict.

And now it was moved in Arreſt of Judgment, that this Covenant being joint and ſeveral, therefore where the Action is brought againſt one of the Covenantors (as it was in this Caſe) it ought to be upon the ſeveral Covenant, and not againſt both, unleſs it had been brought on the joint Covenant.

Beſides, the Breach is aſſigned againſt both the Covenantors; which is ill, becauſe the Action was brought againſt one, and by one of the Covenantees, when it ought to have been brought by both upon the joint Covenant.

Two Perſons may engage for the Acts of both, as well as for the Acts of one, and each may covenant for the other as well as for himſelf, but that which is fatal in this Action is, that the Covenant was made to two, ſo they both ought to join, for otherwiſe one may recover, and ſo may the other, ſo that the Covenantor would be doubly charged. Curia.

However, they were all of Opinion, that the Plaintiff ſhould take his Judgment, becauſe the Defendant had covenanted for the Acts of his Companion as well as for his own Acts; and the Breach and Non-performance of the Covenant being laid jointly againſt both the Covenantors, 'tis well enough.

The moſt material Objection is, that both the Covenantees ought to have joined in bringing this Action, and that it ſhould not be brought by one of them alone.

But it was adjudged, that the Action is ſevered by the ſubſequent Covenant, by which the Defendant and the ſaid Griffith covenanted each of them to pay a ſeveral Moiety of the Rents, for tho' the Covenant was joint in the Beginning of the Deed, (viz.) They both covenanted to receive the Rents; yet it was ſevered by the apparent Intention of the Parties by that ſubſequent Clauſe of paying the Moieties to each of the Covenantees; and if that had been omitted in this Deed, then the Action muſt have been joint againſt both, but now 'tis ſevered, and well brought againſt one by one.

Hinton

Hinton *verſus* Parker.

Inventory may be falſified at the Suit of a Legatee, but not of a Creditor.

IN a Prohibition, the Caſe was, (viz.) The Widow of the Teſtator exhibited an Inventory of his Goods in the Prerogative Court; and thereupon Complaint was made by a Legatee, that ſeveral Goods of which the Teſtator died poſſeſſed (naming them) were left out of this Inventory, and an Account was demanded to be given what became of thoſe Goods.

The Defendant pleaded, that the ſaid Goods were diſpoſed by the Teſtator in his Life-Time, and by his Leave, and on this Plea, the Spiritual Court gave Coſts, for that it was a Confeſſion of more Aſſets than were in the Inventory.

Whereupon the Defendant now moved for a Prohibition on a Suggeſtion, that the Court proceeded to falſify an Inventory which they had not Power to do, becauſe by exhibiting thereof, their Jurisdiction was determined.

Curia.

By the Civil Law, if the Creditors or Legataries, or any other Perſon concerned, ſhould diſcover any Thing omitted, or ſhould miſtruſt it, they will be admitted to prove the Omiſſions and Frauds which they ſhall alledge. 1 *Dom.* 622.

The Court was of Opinion, that the Spiritual Court could not falſify an Inventory at the Suit of a Creditor, but at the Suit of a Legatee they might.

The Pariſh of St. Olave *verſus Pariſh of* All-Hallows *on the Wall.*

An Apprentice ſerved two Years in one Pariſh, and was turned over to a Maſter in another Pariſh, and then ſerved out his Time; he ſhall be ſettled in the laſt Pariſh.

THE Caſe was, ſ. One Underwood was bound Apprentice to a Farrier in the Pariſh of St. Olave, and having ſerved 2 Years of his Time in that Pariſh, was by a verbal Agreement between his Maſter and one Tho. Dennis, ſent to ſerve the ſaid Dennis in the Pariſh of All-Hallows on the Wall in London, and there he ſerved him five Years; and afterwards coming back into the Pariſh of St. Olave, and being likely to be chargeable, he was removed by an Order of two Juſtices to the Pariſh of All-Hallows, which Order was confirmed upon an Appeal to the next Seſſions; and both the Orders being removed by Certiorari into B. R. It was objected, that both of them ſhould be quaſhed, becauſe the Apprentice was not turned over by Writing to the Maſter who dwelt in All-Hallows; and if ſo, then he could not gain a Settle-

ment there upon Account of his Apprenticeship, because it cannot be said, that he served in that Parish as an Apprentice.

This very Point was determined in Michaelmas-Term, 3 Georgii, between the Parish of St. Leonard in Shoreditch, and Trinity-Parish; and it was thus, (viz.) An Apprentice bound to a Master living in one Parish, and serving some Part of his Apprenticeship there was, by a verbal Agreement made between his Master and another, to serve out his Time with that other Master in another Parish; and this was adjudged a good Settlement in that other Parish where he last served; for it shall be still intended, that he served his first Master upon that Agreement, and that it was but a Continuance of his Apprenticeship; and so it was adjudged in the principal Case. Curia.

St Giles's *Parish in* Reading *versus The Parishes of* Eversly, Blackwater, *&c.*

THE Case was, ff. One William Chesterman, the Father of the Children now removed by the Order of two Justices of Peace, was born in the Parish of St. Giles's in Reading, and bound Apprentice in the Parish of Eversly, and having served two Years of his Apprenticeship there, his Master broke, and then this Apprentice came back to Reading, where he was born, and there married, and has these Children, and in some Time afterwards he died. Children must be settled where their Parents were settled.

There were Endeavours in his Life-Time to remove him to Eversly, where he had served two Years of his Apprenticeship, but he was not actually removed.

But after his Death his Widow and Children were by Order of two Justices sent to the said Parish of Eversly; and upon an Appeal to the next Sessions, that Order was quashed, and an Order made, that they shall be sent back to the Parish of St. Giles's, because the Wife before her Marriage had a lawful Settlement there.

And now both these Orders being removed into B. R. by Certiorari, it was moved to quash the Sessions Order, for that the Settlement of the Children ought to follow the Settlement of the Father. Raym. 446. Salk. 528.

The Chief Justice was of Opinion, that during the Life-Time of the Father, the Settlement of the Children must be where he was settled, and thither they may be sent; Curia.

but if he had no legal Settlement, then the Children must be sent to the Place where they were born.

Now the Father of these Children being dead, and some Attempt being made to remove him in his Life-Time, tho' he was not actually removed; yet that shews his Settlement was contended, and the Children being born under such a contested Settlement must be sent to the Place of their Birth, tho' it might have been otherwise, if there had been no Contest.

But there were two Judges of a contrary Opinion, (viz.) That after the Death of the Husband, who was the Father of these Children, both their Mother and the Children ought to be sent to the Place where he had a lawful Settlement; and that his Death (in this Case) made no Alteration as to the Settlement; for where-ever the Husband and Father had a legal Settlement, the Widow and Children gain a Settlement there.

Nor doth it alter the Case, though the Wife had another Settlement before her Marriage, because by her Marriage, that Settlement was lost, and Birth gains a Settlement of the Children in no Case, but where the Settlement of their Father or Mother is not known, excepting only in Cases of Bastardy, and there it gains a Settlement only prima facie till the legal Settlement is known, and no longer, and the Reason is, because the Children should not be Vagrants.

Bastards settled where they are born.

'Tis true, a Servant may be settled in a Place where his Master had no Settlement, as if he was a Visitor or Scholar; for that Service which is the Foundation of his Settlement is entirely independent of his Master; but that is not like the present Case, (viz.) The Settlement of a Child by Virtue of the Settlement of his Parents, because by the Law of Nature, they are to provide for their Children, so that their Settlement must necessarily depend upon that of their Parents.

Servant may be settled where his Master had no Settlement.

Afterwards by the better Opinion of the Court, the Order of Sessions was quashed, and the Order of the Justices confirmed.

Grey *verſus* Bendiſh.

INdebitatus Aſſumpſit brought againſt the Defendant by an Aſſignee of Commiſſioners of Bankrupts.

Statute of Limitations pleaded to an Aſſignee of Commiſſioners of Bankruptcy, and good.

The Defendant pleaded the Statute of Limitations, (viz.) Non Aſſumpſit infra ſex annos & ſic nil debet.

The Plaintiff replied, That the Aſſignment by the Commiſſioners, &c. was made to him on ſuch a Day, anno 5 Georgii, &c.

The Defendant demurred to the Replication, and it was argued for him, that it was ill, becauſe the Plaintiff did not ſet forth how the Perſon became a Bankrupt, (viz.) That he was indebted to any Perſon, &c. and abſconded, or had done any other Act of Bankruptcy; but if he had ſet forth this Matter, it doth not appear by the Pleadings, that the Defendant made any Promiſe to the Bankrupt himſelf within ſix Years, or that the Caſe of Bankrupts was within the Saving of the Statute of Limitations, by which 'tis enacted, That Actions on the Caſe for Slander muſt be commenced within two Years after the Words ſpoken; and all Actions of Treſpaſs, of Aſſault, Battery, and Wounding and Falſe Impriſonment muſt be commenced within four Years after the Cauſe of Suit, and all other Actions on the Caſe, Actions for Account (other than ſuch as concern Merchandize) Actions of Debt, Detinue, Treſpaſs, Trover, and Replevin muſt be brought within ſix Years after the Cauſe of ſuch Actions and Suits, and not after.

But the Right of Action in the Caſes aforeſaid, is ſaved to Infants, Feme Coverts, Non compos mentis, to Perſons impriſoned or beyond Sea, ſo as they commence their Suits within the Times above limited reſpectively, after their Impediments removed; but the Right of Bankrupts is not mentioned.

This was admitted by the Counſel on the other Side for the Plaintiff (the Aſſignee); but they inſiſted, that the Right to this Action was a new Right veſted in him by Act of Parliament.

Econtra. Cro. Car. 139, 349, 513. 1 Lev. 191. 2 Lev. 166. 1 Sid. 305. 2 Mod. 212.

To which it was anſwered, and ſo reſolved by the Court, that the Statute of Bankruptcy transfers the Right to the Aſſignee, but 'tis no more than the old Right which the Bankrupt had before he had committed any Act of Bankrupt-

Curia.

cy, and therefore the Aſſignee muſt take it in the ſame Plight and Condition as the Bankrupt himſelf had it; and ſo it hath been adjudged in the Caſe of Maſon and Plunkett, that the Aſſignee was in the ſame Condition (as to the Right) with the Bankrupt himſelf, and conſequently if he was barred by the Statute of Limitations, ſo ſhall the Aſſignee.

Jones *verſus* Thurloe.

Inn-keeper may detain a Horſe for one Night's Meat.

TROVER brought by a Common Carrier againſt an Inn-keeper, for Keeping the Plaintiff's Horſe, and converting him to his own Uſe.

The Defendant pleads, that he is an Inn-keeper, and that the Carrier owed him ſo much Money for Horſe-meat at ſeveral Times (all which he ſet forth in his Plea), and that by the Cuſtom of the Realm, an Inn-keeper may detain Horſes for their Keeping; and that he, this Defendant, on ſuch a Night, detained the Plaintiff's Horſe for what was due to him, &c. which is the ſame Trover and Converſion of which the Plaintiff complained, &c.

Moor 876. 2 Roll. 85, 86.

And upon Demurrer to this Plea the Court was of Opinion, that by the Cuſtom of the Realm, if a Man lies in an Inn one Night, the Inn-keeper may detain his Horſes till he is paid for the Expences; but if he gives him Credit for that Time, and lets him depart without Payment, then he hath waived the Benefit of that Cuſtom by his own Conſent to the Departure, and ſhall never afterwards detain the Horſe for that Expence.

For this Cuſtom is founded on the Hardſhip of the Inn-keepers Caſe to ſue for every little Debt, or on a greater Hardſhip, that he may not know where to find him who was his Gueſt after he was gone; therefore when he hath waived that Privilege which the Law gives him, he muſt rely on his other Agreement.

Now, in the Principal Caſe, the Inn-keeper having ſeiſed this Horſe for the Expences of ſeveral Nights, and not for one Night, and no more, (which he might lawfully do) ſuch Seiſure is not lawful, and by Conſequence 'tis a good Evidence of the Converſion.

In the Argument of this Caſe the Chief Juſtice held, that tho' the Inn-keeper might detain a Horſe for his Meat for one Night, yet he could not ſell the Horſe and pay himſelf; if he

did, it was * a Converſion, for he is not to be his own Carver. * 1 Vent. 71.

Wilkinſon *verſus* Meyer.

COvenant upon an Agreement in Writing for South-Sea Stock, wherein the Plaintiff covenanted by Indenture to transfer the Stock before the 25th Day of March, or within four Days after; and the Defendant covenanted to accept the ſame, and to pay ſo much Money for it, infra tempus prædict', which he had not paid. Where the Covenants are mutual, a Requeſt to perform them, is not neceſſary.

And upon a Demurrer to the Declaration it was inſiſted for the Defendant, that here was an indefinite Time ſet forth for the Performance of this Covenant, therefore the Plaintiff ought to have ſet forth a Requeſt to perform it, otherwiſe he cannot be entitled to this Action.

This is a mutual Covenant, and in ſuch Caſe the Plaintiff may maintain his Action without laying any Requeſt made by him to the Defendant to perform it, or that he on his Part was ready, and offered to perform it; for the Time is not indefinite, as hath been ſuggeſted, becauſe the Defendant was to accept the Stock, and pay the Money infra tempus prædict', which muſt be within the four Days, and therefore there is no Occaſion of averring a Requeſt in this Declaration; this Caſe is the ſame with that of Blackwell and Naſh, only in that Caſe one Day was appointed, and here are four Days. Curia.

Woolley *verſus* Briſcoe.

BY the * Statute 7 Geo. 'tis enacted, That every Contract for Sale or Purchaſe of Subſcriptions, or Stock of the *South-Sea* Company, which ſhall be unperformed, or ſhall not be compounded between the Parties thereto, by 29 *Sept.* 1721, or an Abſtract or Memorial thereof ſigned by the Party intereſted therein, and who ſhall be intitled to take Advantage of the ſame, ſhall be entered in Books kept for that Purpoſe by the Company, to whoſe Capital ſuch Stock doth relate, at ſome Time before the Firſt of *November*, 1721, and in Default of ſuch Entry, every ſuch Contract, as to ſo much thereof as ſhall remain unperformed, or not compounded by the 29th of *September*, 1721, ſhall be void. * 7 Geo. cap. 1. Where the Iſſue is immaterial, and where the Defendant ſhall not take Advantage of a bad Replication.

The

The Plaintiff brought an Action against the Defendant, to whom he (the Plaintiff) had sold some South-Sea Stock, and entitled himself to the Action, by averring, that he tendered the Stock at the Day and Place agreed on, but that the Defendant did not accept the same, or pay the Money.

The Defendant pleaded, that the Contract for the Sale of the said Stock was not entered in the Company's Books, at any Time before the first Day of November, 1721, secundum formam statuti, so that the said Contract was void.

The Plaintiff replied, that the said Contract was entered, &c. before the first Day of November, 1721, secundum formam statuti, upon which they were at Issue, and the Plaintiff had a Verdict.

It was moved in Arrest of Judgment, that this was an immaterial Issue, for the Day of the Month and the Year was Part of the Issue, which ought not to be.

To which it was answered, that the Substance of this Replication was, that the Contract was entered secundum formam Statuti; 'tis true, the Day and Year are mentioned, but that shall be rejected as Surplusage.

Curia. This Replication had certainly been good, if it had been, that the Contract was entered secundum formam Statuti, before the first Day of November, 1721, and it ought to have the same Construction, tho' the Time is placed before the Words secundum formam Statuti.

But if the Replication had been bad for the Reason beforementioned, yet the Declaration being good, the Plaintiff shall have his Judgment, for the Defendant shall never take Advantage of a bad Replication, on which a formal Issue cannot be joined.

The King *versus* Ford.

Indictment for selling Ale without License. * 3 Car. 1. cap. 3.

THE Defendant was convicted upon the * Statute 3 Car. by which 'tis enacted, that none shall keep an Alehouse without Licence, on Pain of Forfeiture of 20 s. to the Poor, &c.

And now it was moved to quash this Conviction, because Alehouse-keepers selling Ale without License are punishable by former Statutes, particularly by the Statute 5 & 6 Ed. 6. (viz.) That none should keep Alehouses without a License granted, either in Sessions, or by two Justices (Quorum unus) on Pain of three Days Imprisonment, without Bail.

Now it doth not appear in this Case, but that the Defendant might be licensed by two Justices of Peace according to that Statute; and if so, then this Conviction ought to be quashed.

The Statute 5 & 6 Ed. 6. is intirely out of the Case, because 'tis alledged in the Indictment, that the Defendant sold Ale contrary to the Statute 3 Car. and it being likewise averred, that he sold it sine aliqua licentia quacunque, the Objection that he might be licensed by two Justices is of no Weight. Curia.

The King *versus* Ashton.

THE Wife of one Ashton was convicted by two Justices upon the Statute 1 Geo. for destroying Fruit-Trees, the Punishment for which Offence is, to be sent to the House of Correction for three Months, and to be publickly whipped once in every Month during that Time; and it was moved to quash this Conviction, because it did not specify the Punishment inflicted by that Statute, for that being a particular Punishment, (viz.) To be sent to the House of Correction for three Months, &c. ought to be set forth in the Conviction specially, since this Offence is to be heard and finally determined by the Justices. 1 Geo. c. 48. Conviction for destroying Fruit-Trees, &c.

One of the Judges doubted of this Matter, because where any Forfeiture is to be upon a Conviction, 'tis not sufficient to say Ideo consideratum est quod convictus est; but it must likewise be said & forisfaciat, and so was the Case of the King and Searle; but in the Case of the King *versus* Chanler, it was Ideo consideratum est quod convictus est only, without any more.

But the better Opinion was, that this being a special Judgment of the two Justices, they should have specified, the Punishment which the Statute inflicts upon the Offender, because it may be different from the Punishment inflicted by them; however, there being no Forfeiture for this Offence, it was held, that Ideo consideratum est quod convictus est was sufficient. Hawk. Pl. Coron. 2d. Part 279.

Brook

Brook *verſus* Wingfeild.

The Court will not take judicial Notice of a Cuſtom after Sentence.

THERE was a Libel exhibited againſt the Defendant for deformatory Words ſpoken by him in London, and after Sentence, he moved for a Prohibition, and obtained a Rule, that the Plaintiff ſhould ſhew Cauſe, &c. why a Prohibition ſhould not go.

And now the Cauſe ſhewn why it ſhould not go was, that it ought to appear on the Face of the Libel, that the Matter is not of ſpiritual Conuſance; otherwiſe that Court ſhall not be prohibited, eſpecially after Sentence; but no ſuch Thing appears on this Libel, for the Defendant only ſuggeſts a Cuſtom in London, that defamatory Words ſpoken there are actionable, which ought not to be ſuggeſted, nor any Thing offered in Proof which is out of the Libel, eſpecially ſince the Defendant hath ſubmitted ſo far to the Juriſdiction of the Spiritual Court till Sentence was given againſt him.

If there had been any ſuch Cuſtom, he ought to have pleaded in Bar to the Juriſdiction of that Court, for the Courts at Weſtminſter are not ex officio to take judicial Notice, that there is any ſuch Cuſtom in London.

Curia. There is a Difference between a Motion of this Kind before, and after Sentence in the Spiritual Court, for in the one Caſe this Cuſtom need not be proved by Affidavit, becauſe 'tis ſufficiently known, but a judicial Notice ſhall never be taken of it after Sentence; ſo the Rule was diſcharged.

Huxſer *verſus* Gapan.

Amendment of a Declaration in Trover.

IN Trover for a Ring, the Defendant moved for Leave to bring it into Court, and that it might be ſtruck out of the Declaration.

Curia. This being an Action for Damages founded on a ſuppoſed Converſion, the Motion was denied, but if it had been an Action of Detinue, it would have been granted.

Salk. 597. Then the Plaintiff moved for Leave to amend his Declaration, and add more Counts to it, having only declared for 15s. Damages, and this was to give the Court Juriſdiction, and

and tho' this was ſtrongly oppoſed on the other Side, he had Leave to amend.

And per Curiam, In Trover the Converſion is the Point in Iſſue, for which the Time and Place ſhould certainly be alledged. Cro. Eliz. 79.

The King *verſus* Erbury.

DR. Erbury being apprehended by Virtue of a Warrant from the Secretary of State, for being the Author of a ſeditious Libel, was bailed to appear in B. R. the firſt Day of Eaſter-Term laſt, and he accordingly appearing, it was moved by the Attorney General, that he might be committed, becauſe he was outlawed upon an Information, for being the Author of a ſeditious Libel, entitled, The Clemency of the Kings of England, and thereupon he was committed. One outlawed for a ſeditious Libel may be bailed on bringing a Writ of Error.

And upon another Day being brought up by Habeas Corpus, he moved by his Counſel to be bailed, which was oppoſed by the Attorney General, for that he was not entitled to ſo much Favour ex debito Juſtitiæ, before he had brought a Writ of Error to reverſe the Outlawry.

Then he produced ſome Affidavits to ſhew, that he had done all in his Power to have a Writ of Error allowed, and that he had applied to the Secretary's Office for that Purpoſe; to which the Attorney General anſwered, that if he (the Doctor) had made any Application to him, he would have ſigned a Fiat at any Time, which he having neglected to do, ſuch Neglect ought not to be any Excuſe to him.

Two Judges were of Opinion, that his Outlawry was a Confeſſion of his Crime, and equal to a Conviction, and therefore if he had brought a Writ of Error, the Court might have refuſed to bail him.

But the other two Judges held, that if this had been a Caſe at Common Law, and not within the * Habeas Corpus Act, bail might be denied; but 'tis within the very Words of that Act, which are, that a Man arreſted or taken on any Capias Utlegatum, &c. may be bailed, and it would be very hard if it ſhould be otherwiſe; for this Man ought not always to be impriſoned for a Miſdemeanor or a Contempt, the Outlawry being no more than a Contempt of the Law, and a Means to compel him to anſwer; and as yet he is un- * 31 Car. 2. cap.

der no Conviction; and the Bail he is to give is only to profecute his Writ of Error with Effect.

Then the Chief Juſtice deſired the Counſel for the Defendant to ſhew ſome colourable Error to reverſe this Outlawry, ſo that it may appear to the Court 'tis not for Delay, and to avoid Juſtice.

But the Counſel replied, that they intended to follow the common Practice, as in Caſes of this Nature, and that they would aſſign Errors in Fact, which probably might be confeſſed by the Attorney General upon giving Bail to anſwer the Trial of the Merits upon this Information.

And thereupon the Solicitor for the Defendant exhibited a Petition to the Attorney General for a Writ of Error, who ſigned a Fiat in Court; and then his Counſel ſaid, that they would take out the Writ the next Seal-Day, and that this being the laſt Day of the Term, it would be hard to continue him in Cuſtody all the Vacation, eſpecially when it appeared to the Court, that the Writ of Error was proſecuted for his Diſcharge.

Curia. The Court was of Opinion, that it was very extraordinary to take Bail to proſecute a Writ of Error before the Writ was actually ſued out; therefore when the Writ is ſealed, the Doctor may attend a Judge at his Chamber, and if he thinks it convenient, he may take Bail there.

Harriſon *verſus* Green.

Non Aſſumpſit no good Plea to an Action brought againſt a common Carrier.

THIS was an Action on the Caſe brought againſt a common Carrier for Goods loſt which were delivered to him to carry for Hire.

Cro. Eliz. 470. Upon Non Aſſumpſit pleaded the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that Non Aſſumpſit was an ill Plea to an Action founded on a Cuſtom of the Realm (as this was) unleſs there had been ſome ſpecial Promiſe to deliver the Goods.

The Court doubted, becauſe the Foundation of this Cuſtom is upon a ſuppoſed Promiſe to deliver the Goods ſafely.

The King *verſus* Thorogood.

THE Defendant having made an Affidavit in the Court of Common Pleas, and the Truth thereof being controverted, he was ſummoned to appear in Court, and accordingly did appear in Eaſter-Term laſt, and confeſſed, that he made the Affidavit, and that it was falſe. The Defendant confeſſed himſelf guilty of Perjury, and was put in the Pillory.

Whereupon that Court recorded his Confeſſion, and ordered, that he ſhould be taken into Cuſtody, and put in the Pillory for Perjury.

And now it was inſiſted by his Counſel, that this could not be done upon his own Confeſſion, becauſe 'tis not a Conviction, but only Matter of Evidence, for he ought judicially to be brought before the Court by Indictment, and therefore his Confeſſion ought not to have been recorded.

Beſides, the Court of Common Pleas hath no Juriſdiction in Criminal Caſes, and therefore if it had appeared on Record, that the Defendant was perjured, that Court could not have puniſhed him.

To argue that a Criminal ſhall not be convicted upon his own Confeſſion, is not only a new, but a very ſtrange Doctrine, becauſe the Confeſſion of a Crime is the ſtrongeſt Proof of Guilt. Contra.

'Tis likewiſe very ſtrange to object, that the Court of Common Pleas hath no Juriſdiction in this Caſe, becauſe the Puniſhment by Pillory, is by Virtue of the Statute 5 Eliz. and the Court having given a Sentence accordingly, ſhews, that they proceeded on that Statute by which Power is given to any Court where the Perjury is committed, to puniſh the Offender; ſo that 'tis plain that Court hath a Juriſdiction, eſpecially ſince 'tis provided by that very Statute, that it ſhall not extend to any Eccleſiaſtical Court, which being a negative Pregnant, is a full Proof, that all other the King's Courts may puniſh ſuch Offenders, and even thoſe who ſhall be convicted by their own Confeſſion; for the Statute gives Power to hear and determine by Inquiſition, Information, Bill, Preſentment, or otherwiſe, and to give Judgment and award Execution, &c. now by the Word Otherwiſe, the Confeſſion of the Party may be intended. 5 Eliz. cap. 9. 1 Lev. 155.

Beſides, if that Court cannot puniſh the Defendant by Virtue of the Statute 5 Eliz. he might be puniſhed at Common Law, for Perjury is an Offence at Common Law, and

any Court may punish such a Criminal for an Offence committed in facie Curiæ; which was the better Opinion in * Bushell's Case, tho' the Chief Justice Vaughan doubted it.

*Vaugh. 152.

But notwithstanding what was said by the Defendant's Counsel, he was put in the Pillory the last Day of the Term.

Hiliard *versus* Phaly & al'.

UPON a Trial at Bar on an Issue directed out of Chancery; the Question was, Whether Mr. Hiliard, the Plaintiff's Brother (who was seised in Fee of the Lands in Question (of the yearly Value of 600 l.) was married to Sarah Phaly, the Mother and Guardian of the Defendant, before such a Day, which was his Birth-Day; there were three other Issues to the same Purpose, she having three other Sons.

The Defendant (the Infant) by his Mother and Guardian, pleaded, that the said Mr. Hiliard was married to her before the Birth of any of the Defendants; upon which they were at Issue; so that the Plea being in the Affirmative, the Proof was upon the Defendants, which was as followeth:

1. First, It was said by their Counsel, that this Plea being in Favour of Legitimation, in such Case Cohabitation hath always been allowed to be good Evidence; and it was in Proof, that Mr. Hiliard cohabited with this Woman above twenty Years, that in such a Year, &c. he came with her out of Lincolnshire to London, and lodged in Wild-street, where they were married by a Priest who served the Portugal Ambassador; and it was proved, that such a Priest was about that Time Chaplain to the Ambassador.

That Mr. Hiliard was a Roman Catholick, and for that Reason there was no Body present at the Marriage, or who could prove that she was actually married besides her self; but there was sufficient Evidence, that he acknowledged she was his Wife, and desired the Witnesses to use her as such; and that on the Day of his Death, and but a few Hours before he died, he declared in the Presence of his Physician and several others (who were now produced as Witnesses) that he was married to her.

For the Plaintiff.

On the other Side it was admitted, that this is a favourable Issue, because it was to support Legitimation; but 'tis to be favoured only where the Matter is doubtful to the Court and to the Jury, and not where there is such clear Proof to the contrary, that there can be no Room to doubt.

Now the Proof was, that Mr. Hiliard took this Woman long since to be his House-keeper; that soon afterwards she was with Child, and that both of them went to London to avoid Prosecution in the Spiritual Court; but yet after the Birth of three of these Children, he was prosecuted in that Court for Fornication with this Woman, and that Sentence was given against him, and Penance enjoined, and that he actually paid the Commutation Money.

That he ordered his Servants not to call her Mistress, but by her proper Name, and that he frequently told his Neighbours, and some of his most intimate Acquaintance, that he was never married to this Woman.

Then the Parson of the Parish deposed, That he knew this Woman ever since she first became a Servant to Mr. Hiliard, and that he always took her to be his Concubine, and not his Wife.

But to obviate the Parson's Evidence, there was a Letter produced under his Hand in very endearing Words and Expressions, wherein he assured her, that if she would marry him, then he would assist her to baffle all the Attempts of her Enemies to disprove her Marriage with Mr. Hiliard; and being asked by the Chief Justice what could induce him to write such a Letter, if he took her to be a Servant and a Concubine; the Parson answered, that greater Men than he had married Servants. Econtra.

It was farther proved on the Plaintiff's Side, That upon the Death of Mr. Hiliard this Woman got into her Custody all the Writings concerning the Inheritance of these Lands; and upon a Bill in Chancery exhibited against her to discover the same, she answered, that she was married to Mr. Hiliard about three Years before he died, and so insisted to keep the Writings, which Answer was now offered to be given in Evidence; but it was opposed on the other Side; for tho' it might be conclusive against her self, if she pretended to any Dower, or to a Jointure, yet it cannot be given in Evidence against a third Person not deriving any Title under her; and the Court being of that Opinion, the Answer was not read.

Then they offered to give the Proceedings in the Spiritual Court in Evidence, but that was likewise denied, because what was done in the Spiritual Court cannot be Evidence at Common Law where the Title of Lands is in Question.

So the Jury gave a Verdict for the Defendants.

But

But the Lord Chancellor thought it hard, that such Evidence had been rejected, for as to the Answer in Chancery, he said, that it was plain, where there is any Confidence or Trust between the Parties, the Confession of one in an Answer, &c. might be given in Evidence against the other, though it might be a Question whether such Evidence was conclusive, or not.

Then as to the Proceedings in the Spiritual Court, admitting there had been a Marriage in this Case, and they had afterwards been divorced for Consanguinity or Affinity, such Sentence of Divorce would have been conclusive Evidence to bastardise the Children born in Wedlock before the Divorce; and what could be better Evidence in a Court of Law to shew there was no Marriage, than a Sentence in the Spiritual Court carried on in a regular Suit, and pronounced in the Life-time of the Parties, that they were guilty of Fornication, and the Proof of the Commutation-Money paid by the supposed Father.

DE
Term. Sanct. Mich.
Anno 10 Georgii, 1724.

The Case of Trinity Chapel *in* Dublin *versus The Archbishop of* Dublin.

Where the Ordinary is Visitor of a Royal Foundation.

UPON a Writ of Error brought in the King's Bench in Ireland, on a Judgment given in the Common Pleas there, the Case was:

1. The Archbishop of Dublin libelled in the Spiritual Court there against the Dean and Chapter of Trinity Chapel there, for denying to admit him to visit them.

The Defendants suggested for a Prohibition, that the said Chapel was of Royal Foundation, being first a Monastery of Royal Foundation, and afterwards translated into Dean and Chapter, and being a Donative, was exempted from the Visitation of the Ordinary; and thereupon a Prohibition was granted, and that the Plaintiff should declare upon it, which he did, setting forth, that this Chapel was of Royal Foundation, and that the Ordinary had no visitatorial Power there, but what he had by Virtue of the Letters Patent of Creation made by H. 8. anno 33 of his Reign, by which 'tis expressly provided, that the Archbishop shall have no Power or Control over the Deanery, but such as he had over the Prior and Convent of the Holy Trinity, Time out of Mind, which Priory was of Royal Foundation, and had Time out of Mind been visited by the King or his Chancellor.

The Defendant, the Archbishop, having craved Oyer of the Letters Patent of H. 8. pleaded, that the King did farther Order and declare therein, that the Church of the Holy Trinity

Trinity ſhould be the Archiepiſcopal Seat of Dublin, as it was before, and as it uſed to be; and that the Archbiſhop ſhould exerciſe no Juriſdiction there, but ſuch as he uſed when it was a Priory; and that Time out of Mind the ſaid Archbiſhop, and his Predeceſſors, Archbiſhops of Dublin, kept their Cathedrals in this Church, and that the Prior and Convent before, and the Dean and Chapter ſince the Tranſlation, were the Chapter of the ſaid Archbiſhops, and Time out of Mind had been viſited by them, as Occaſion required, and traverſed, that the Priory was of Royal Foundation.

The Plaintiff demurred ſpecially, and after Argument, the Archbiſhop (the Defendant) had Judgment for a Conſultation, which Judgment was affirmed upon a Writ of Error in the King's Bench in Ireland, and that Judgment being about to be confirmed likewiſe in the King's Bench here, ſome Objections were made as follow:

1ſt. This Writ of Error was a Judgment coram Juſticiariis noſtris de Communi Banco Hiberniæ; whereas the Action was commenced in that Court in the Queen's Reign, and thereupon this Court was of Opinion, that the Record was not well removed; ſo that Writ of Error was abated, and a new Writ was afterwards brought in this Court.

And then it was objected, that the Writ of Error in Ireland, by which the Cauſe was removed from the Common Pleas to the King's Bench there, was not good, becauſe it was directed Johanni Foſter Armig. omitting Capitali Juſticiario de Communi Banco, and this being apprehended to be a Fault, and not to be maintained, the Defendant in Error, upon Diminution alledged, got a Certiorari to the Chief Juſtice of the King's Bench in Ireland, to certify the Record as it ſtood before him in that Court, but he certified the Record to be right; ſo that this appearing to be the Miſtake of the Clerk only, it was now moved, that it might be amended; and accordingly it was amended.

Then it was objected, that this Writ of Error was of an Error in redditione judicii loquelæ quæ fuit in Curia Annæ Reginæ, when the Judgment was given in the Common Pleas in Ireland, anno primo Georgii.

To which it was anſwered, that the Loquela began in the Reign of the Queen, and the Word Quæ being a Relative, ſhall refer to that Court of the Queen.

The next Objection was, that the Writ of Error to remove the Record into the King's Bench in England, was returnable on ſuch a Day, and that the Archbiſhop did not

appear within five Terms afterwards, so that the Cause was discontinued.

To which it was answered, that the Defendant in Error may come in at any Time; nay, he need not come in at all till the Plaintiff assign Errors; 'tis true, he may come in if he pleases, and bring a Scire facias to compel the Plaintiff to assign Errors; but this is at his Election, which the Court agreed, and afterwards affirmed the Judgment of the King's Bench in Ireland; and thereupon a Writ of Error was brought in the House of Peers, and there this Cause was argued upon the Merits.

ſſ. The Case as it stands upon the Pleadings is, that the Archbishop of Dublin proposed a Visitation of this Deanery, as he was Ordinary of the Place; and the Plaintiff in the Prohibition not attending, he was prosecuted by the Archbishop in the Spiritual Court there, and thereupon the Plaintiff moved for a Prohibition, and had it upon a Suggestion, that this Chapel was of Royal Foundation, and therefore exempted from any visitatorial Power of the Ordinary.

This being the Substance of the Case, it was argued for the Dean, that it was to be visited only by the King or his Chancellor, but not by the Ordinary, because it was a Royal Foundation; that when this was created a Deanery by the Letters Patent of H. 8. Anno 33 of his Reign, it was provided by the Letters Patent of Creation, that the Archbishop should have no Power over the Deanery, other than what he had before over the Priory; therefore if he had any Right, he ought to have pleaded it, and to have set forth what Power he had over the Priory, otherwise his Plea is immaterial.

On the other Side it was argued, that this being an Ecclesiastical Corporation, is by common Intendment subject to the Visitation of the Ordinary of the Place, unless by the Letters Patent of Creation there had been a Visitor appointed by the Founder; for all such Corporations are prima facie subject to the Jurisdiction of the Ordinary, tho' they were founded by the Crown; and so is Corbett's Case in Dyer 273. Econtra.

The only material Point is, Whether this was a Royal Foundation, or not, which was not the Point in the Case of this Archbishop and Dr. Harrison some Years past, who was a Prebend of this Church; for if the Priory was not of Royal Foundation, the Deanery into which it was translated by Letters Patent cannot be so; but if it was of Royal Foundation, then the Translation into Dean and Chapter

is no Prejudice to the Founder, for he remains Founder still, for nothing is altered but the Monastick Rule and Habit; and so it was held in the * Dean and Chapter of Norwich's Case, Anno 30 H. 8. in which Year, and by that King, the Prior and Convent of the Cathedral Church of the Holy Trinity of Norwich, was translated into the Dean and Chapter.

* 3 Rep. 73.

Therefore if nothing is altered by the Translation, then by Consequence the Founder is not deprived of his Right of Patronage, neither is the Visitor deprived of his Right of Visitation, because 'tis still the same Body corporate, tho' by another Name.

The Judgment was affirmed.

The King *versus The Mayor of* Tiverton.

Information against the Defendant for Bribery.

UPON a Motion for an Information against the Defendant for Bribery, at an Election of a new Mayor for the Corporation of Tiverton in Devonshire; and when he found he could not succeed in the Choice of the Defendant (the old Mayor) withdrew himself on the Day of Election, so that a new Mayor could not be chosen, tho' the Common Council did all in their Power to proceed to an Election, by appearing on the Stairs in the Town-Hall for that Purpose, but the Door was lock'd by the Defendant (the old Mayor) and a Book belonging to the Corporation was taken away; so that for Want of chooling a Mayor on the Day of Election the Corporation was dissolved.

Curia.

The Chief Justice, who was formerly Recorder of this Corporation, said, that there was a Difference amongst the Members thereof about Precedency, so the Rule was made to shew Cause why an Information should not go.

Afterwards, in Hillary-Term, it appeared, that there was Bribery on both Sides, so Informations were filed against both Parties, and the Court agreed, that Bribery was a sufficient Cause to remove a Man from his Office, and that it was an Offence by which the very Constitution of the Government might be altered.

Anonymus.

UPON a Motion for an Information against the Defendant, upon an Affidavit of the Proſecutor, who made Oath that he had loſt 15 l. or thereabout, to the Defendant at one Sitting; the Words of the Statute being, ſſ. Any Perſon winning at one Time above the Value of ten Pounds, and being convicted thereof upon an Information or Indictment, ſhall forfeit five Times the Value, *&c.* Information for Gaming. 9 Annæ cap. 14.

The Counſel on the other Side objected, that the Proſecutor had already indicted the Defendant for the ſame Offence, and that the Grand Jury had found the Bill, which was true; but that the Defendant was not tried upon it, becauſe it was quaſhed for Inſufficiency.

However, the Court would not give the Proſecutor Leave to file an Information, for that the Grand Jury had already found a Bill, and tho' the Indictment was quaſhed, they might find another Bill for the ſaid Offence; therefore there was no Reaſon for this Court to interpoſe.

Croft *verſus The Bail of* Harris.

THE Caſe was thus, (viz.) One of the Bail of Harris entered into a Recogniſance before the Chief Juſtice, and the other of the Bail entered into the like Recogniſance before Juſtice Powis; and now a Motion was made to ſet aſide the Enrolment of the laſt Recogniſance, and all the Proceedings againſt the Bail by Scire facias. Bail in what Method to be taken.

Firſt, Becauſe the Recogniſance was enrolled as taken before Juſtice Powis, when it was not taken before him alone, but before him and the Chief Juſtice.

2dly, The Scire facias, and the Alias were both returnable on Return-Days; whereas the Proceedings being by Bill as in Cuſtodia, thoſe Writs ſhould be returnable de die in Diem.

3dly, The Capias ad ſatisfaciend' was irregular, becauſe by the Statute * 3 Georgii, 'tis enacted, That the Plaintiff ſhall mark on the Back of the Writ the real Sum or Debt due to him, before 'tis delivered to the Sheriff to be executed; and here there was no Sum endorſed on the Capias, nor any Time mentioned in the Entry of this Recogniſance. *3 Geo. c. 15.

4thly, The Entry it ſelf was wrong, becauſe it was in London; whereas every Entry in B. R. ſhould be in Middleſex, where that Court ſits, for 'tis no Record till entered there.

Beſides, the Recogniſance is a Lien on the Eſtate of the Bail from the Day that it was taken, and it may be prejudicial to enter it on a future Day, (viz.) on the Day that the laſt Recogniſance was taken, becauſe the Perſon who entered into the firſt Recogniſance might have aliened his Lands before the other was taken.

Econtra. The Defendant ought to have appeared to this Scire facias, and pleaded this wrong Enrolment, and ſhall not now take Advantage of it on a Motion; but this Sort of Practice of taking Bail at ſeveral Times, was ſettled in this Court in the Time of the Chief Juſtice Parker, and is an Eaſe to Defendants; for the firſt Man is Bail only de bene eſſe, and no Bail is really given till the ſecond Man enters into the Recogniſance, for then 'tis compleat, and not before.

As to the ſecond Objection, that theſe Writs of Scire facias were returnable on Return-Days, when they ſhould be returnable de die in Diem; this is an original Cauſe upon the Record, ſo the Proceſs may be on a Day certain, and therefore on the common Return-Days.

Then as to the not Indorſing the Sum on the Recogniſance, that doth not make the Capias void, the Statute requires it ſhould be done, that an Execution ſhould not be taken for more than the real Debt, and inflicts a Penalty, if it ſhould be executed for a greater Sum.

As to the laſt Objection, the Anſwer was, that the Entry ſhould be in Middleſex, and not in London, but that is of Bail to Actions brought in B. R. and not to original Actions upon Recogniſances, as this is.

Curia. If the ſecond Bail had entered into a Recogniſance before the Chief Juſtice as the firſt Man did, that would have related to the Time of the firſt Recogniſance given by the other Bail, and taken before the ſame Chief Juſtice; but here the ſecond Bail entered into a Recogniſance before another Judge, which makes an Alteration of the Caſe.

A Bond ſigned by one at one Day, and by another at another Day, ſhall relate to the firſt Delivery. Cro. El. 622.

A Judge may take a Recogniſance of Bail at his Chamber, and the Entry in his Book is a good Warrant for the Entry of it in the Office, and the Practice is ſettled to take ſuch Recogniſance at one Time, and another at another Time; for the firſt is de bene eſſe, and no compleat Bail is given till the laſt is taken; therefore tho' taken by different Judges, the firſt

first is of no Value till the last is taken, for then the Bail and the Entry is entire and perfect, and not before.

So the Plaintiff took nothing by his Motion.

Williams *versus* Lyons.

AN Action on the Case was brought against the Defendant for a criminal Conversation with the Plaintiff's Wife; upon Not guilty pleaded, the Cause was tried at the Sittings after the Term, and the Jury gave a Verdict for the Plaintiff, and 200l. Damages; and afterwards the Defendant used some indirect Means with the Plaintiff to take a small Sum, and release the Damages, and because he would not take 30 l. and give such a Release, he (the Defendant) got a Warrant of a Justice of Peace to take the Plaintiff for a pretended Murder, which Warrant was executed on him on a Sunday, and he was kept in Custody till Monday; and then was arrested in an Action of five hundred Pounds at the Suit of the Defendant; all which was done to extort a Release from him, which appearing plainly to the Court, a Rule was made, for him and the Constable, and the Bailiff, and the Justice of Peace his Clerk, to shew Cause why an Attachment should not go against them.

The Defendant was guilty of Extortion.

Miller *versus* Bradley.

WRIT of Error on a Judgment in the Common Pleas, and the Judgment was affirmed in B. R. the last Paper-Day of the last Term; therefore the Capias ad satisfaciend' must be returnable in this Term, because the Judgment could not be signed till the Quarto die post, &c. if so, then the Plaintiff having brought a Testatum Capias ad satisfaciendum, that must be irregular, because there could be no Capias ad satisfaciend' on a Judgment not signed, and by Consequence nothing to ground a Testatum Ca. sa. especially this Action being brought by original.

Testatum Capias founded on a *Capias*.

The Objection is, that this Action being brought by Original, no Ca. sa. could issue before the Judgment was signed; and it being obtained the last Paper Day of the last Term, it could not be signed till after the Quarto die post, &c. of this Term; so there being nothing to warrant a Ca. sa. by Consequence the Testatum Ca. sa. must be irregular.

Econtra.

But

But when the Judgment was ſigned, though in the later End of the laſt Term, this by Relation is a ſufficient Foundation to ſue out a Capias the firſt Day of the Term, which will be a Warrant to found a Teſtatum returnable Tres Trin. and ſo good.

To which it was anſwered, that though to ſome Purpoſes the Term is but one Day in Law; yet to other Purpoſes, 'tis not ſo; as for Inſtance; If there be Continuances, there can be no Judgment before they are entered, and the principal Caſe being by Original, there could be no Judgment entered till the Quarto die poſt of the following Term; ſo there could be no ſuch Judgment as is now ſet up to ground a Teſtatum Ca. ſa.

2 Lev. 108. Salk. 626.

Curia. This is a Judgment of the firſt Day of the Term, in which it was obtained by Relation, which is ſufficient to ground a Ca. ſa. and by Conſequence a Teſtatum Ca. ſa. and if there is no Difference between an Action by Bill, and by Original, 'tis regular.

As to the Continuances being carried on from one Term to another, no ſuch Thing appears on the Record, ſo this Execution is regular; 'tis true, if the Continuances had been entered, no Execution could be prior to ſuch Entry, and ſo is 2 Vent. 104. Prince *verſus* Slaughter, and 2 Lev. 176. Dobſon *verſus* Bell.

Whitley *verſus* Loftus.

Father and Son bound, that the Son who was Apprentice ſhould account.

COvenant on an Indenture of Apprenticeſhip, wherein the Plaintiff covenanted with the Father and Son (the Apprentice), and they on the other Side covenanted with him (the Plaintiff), and this Action was brought jointly againſt the Father and the Son; for that the Son had covenanted faithfully to account at his Maſter's (the Plaintiff's) Requeſt, for all ſuch of his Maſter's (the Plaintiff's) Goods as ſhould come to his Hands; and the Breach aſſigned was, that the Defendant (the Son) had not accounted, &c.

Upon non infregerunt conventionem pleaded, the Plaintiff had a Verdict; and now it was moved in Arreſt of Judgment:

(1.) That the Declaration was ill, becauſe the Plaintiff did not ſet forth any Requeſt made to the Son to account, which he ought to have done, that the Defendant might have an Opportunity to traverſe it.

Beſides, this being a joint Action againſt the Father and the Son, and the Breach aſſigned only againſt the Son, cannot maintain this Judgment.

Neither ought the Action to be brought againſt the Father, for he did not covenant, that his Son ſhould truly account, &c. he only covenanted for himſelf ſeparately, to pay the Money which he was to give to the Plaintiff for Taking the Son Apprentice; and the Clauſe in the latter End of theſe Articles is in the ſingular Number, (viz.) That each of them (the Father and Son) binds himſelf for the true Performance thereof; ſo that the Father cannot properly be ſaid to be bound for his Son, but only for himſelf.

It was argued on the other Side, that this was a Covenant entered into by the Maſter (the Plaintiff) on one Part, and by the Son with the Conſent of his Father on the binding Part, but by both Father and Son as to all other Purpoſes; for tho' the Son is only bound Apprentice, yet they both covenant for the true Performance of all Covenants, &c. the Words in the Cloſe of the Articles being, (viz.) That each of them binds himſelf, &c. for the true Performance of all the Covenants and Agreements therein mentioned. Econtra.

And even from the Nature of theſe Covenants, the Father is always bound for the Son; for otherwiſe Maſters could not rely on the Covenants of their Sons, who are commonly under Age, and ſo by Law not capable to conſider what Covenants to make; and conſequently in this Caſe the Father ſhall be taken to covenant for the Performance of his Son's Part as well as his own.

The Court was of Opinion, that the very End of binding the Father was to anſwer the Wrong which might be done by the Son to his Maſter, therefore he (the Father) muſt be obliged for his Son's true Performance of the Articles; 'tis true, at the End of the Articles the Covenant is in the ſingular Number, (viz.) That each of them did bind himſelf, and it muſt be ſo where the Son is bound to perform the Thing for which the Covenant was made; and this Clauſe is uſually inſerted, that the Covenants may be taken diſtributively, (viz.) That each of the Covenantors ſhould perform his Part; and this makes the Covenant of the Son bind the Father, who covenanted for him as well as for himſelf. Curia.

So the Plaintiff had his Judgment.

The

The Lord Coningsby *verſus* Steed.

Coroner being in Contempt, was committed.

A Rule was made, That the Coroners of the County of Hereford, and the High Bailiff of the Franchiſe of Lempſter in the ſaid County, ſhould ſhew Cauſe on ſuch a Day why an Attachment ſhould not iſſue againſt them; the Caſe was as followeth:

ſt. The Defendant Steed is an Attorney of this Court, and formerly High Bailiff of the Liberty or Franchiſe of Lempſter aforeſaid, and then he entered into a Bond of 500 l. for the faithful Execution of the ſaid Office; but falling under the Diſpleaſure of the Plaintiff, he brought an Action of Debt againſt Steed upon the ſaid Bond, and ſued out a Latitat directed to the Sheriff of that County, to which Writ one of the Coroners was Attorney, and ſolicited the Sheriff for a Precept to the High Bailiff of the ſaid Franchiſe, to make a Warrant to apprehend the Defendant Steed, who having brought his Writ of Privilege as an Attorney of this Court, and the Sheriff having returned it upon the Latitat, he would make no Precept to the High Bailiff, &c. Thereupon the Plaintiff brought an Alias Latitat directed likewiſe to the ſaid Sheriff, who ſtill refuſed to grant ſuch Precept as aforeſaid, becauſe of the Privilege of the Defendant, which he (the Sheriff) had returned on the firſt Latitat; then an Original was ſued forth, directed to the Coroners, who accordingly made a Precept to the High Bailiff (who was privy to all theſe Proceedings) and then he iſſued forth his Warrant to the Under-Bailiffs, who arreſted the Defendant, and ſtill keep him in Cuſtody.

And now the Court was moved for an Attachment againſt the Coroners, and the High Bailiff and Under-Bailiffs, for a great Oppreſſion, and for an Abuſe of the Proceſs of this Court, under a Pretence and Colour of Juſtice; and a Rule being made for them to ſhew Cauſe why an Attachment ſhould not go;

It was inſiſted on their Behalf by their Counſel, that tho' it was Wrong to ſue out this Latitat directed to the Coroners, yet they being Officers who are to execute the Proceſs of this Court, are not to diſpute or queſtion, Whether the Writ is iſſued lawfully, or not; neither are the High Bailiff or Under-Bailiffs to do any ſuch Thing, but all of them are to obey the Writ; and if ſo, then the Affidavit of the

Defendant charges them with no Crime, but only in obeying the Process; which is so far from being an Offence, that 'tis probable if the Defendant had brought an Action of False Imprisonment against the Coroners and the rest, &c. they might have justified under this Writ and Warrant.

A Writ is never directed to the Coroners where the Sheriff (who is the proper Officer) stands indifferent; and it was admitted on all Sides in this Case, that the Sheriff was indifferent, so that the Matter seems to be very suspicious against the Coroners and the High Bailiff, (viz.) That they were privy to this Oppression, therefore the Rule was absolute as to them, but discharged as to the Under-Bailiffs. Curia.

Afterwards, on the last Day of Hillary-Term following, one of the Coroners was brought up in Custody into Court, and bailed, the other being bailed before, to answer upon Interrogatories the next Term.

And accordingly Edwards, one of the said Coroners, and Carpenter the High Bailiff, were brought into Court, the other Coroner Landen being in the King's Bench; and Edwards deposed, that he knew nothing of this Oppression, nor acted therein otherwise than by a general Power he gave to the other Coroner Landen, to put his (the said Edwards's) Name to all Writs that came to him, directed to the Coroners, &c. and that he never saw this Writ.

Thereupon his Counsel moved that he might be discharged; for if one Coroner gives the other Authority to put his Name to a particular Writ, that might probably be a Contempt to this Court, because he might know the Nature of such a single Writ; but where such a general Trust or Power is reposed in one Coroner by another, as to set his Name to all Writs which shall come to his Hands, there cannot be so much as the least Suspicion of any Contempt.

This general Authority must be intended to do all legal Acts, so that if the other Coroner to whom it was given, abuses it, such Abuser cannot be a Contempt by that Coroner who gave the Power; therefore this appearing to be the Case of Edwards, one of the Coroners, he was discharged. Curia.

But Carpenter, the High Bailiff, having owned, that what he had done was by Order of the Plaintiff, and that he did it knowingly, tho' he did not advise the doing it; so that he being in Contempt, was committed.

Anonymus.

After a Sentence in a Court of Civil Law, nothing *debors* the Libel ſhall be admitted as a Suggeſtion to ground a Prohibition.

A Rule was made to ſhew Cauſe why a Prohibition ſhould not go to the Court of Admiralty, and thereupon Dr. Andrews, a Civilian, came into Court, and moved, that the Rule might be diſcharged; the Caſe was thus:

ſſ. The Ship called the Honour of London, in her Voyage home from Lisbon, was out of Repair on the High Sea, which the Maſter perceiving near Plymouth, ſent thither to the Plaintiff, who came and agreed with the Maſter to repair this Ship, which by the Civil Law is an Hypothecatian.

Afterwards the Plaintiff in this Prohibition brought the Ship into Harbour, and there ſhe was repaired by the Defendant; now the Contract (which was the Cauſe of Action in the Admiralty) being made on the High Sea, within the Juriſdiction of the Admiral, tho' the Work was done on Land, yet the Recompence ſhall be had for ſuch Work in the Court of Admiralty, eſpecially in this Caſe, the Maſter being run away; ſo the Plaintiff having libelled againſt the Ship in that Court, and obtained Sentence againſt her, it was now moved, that the Rule might be diſcharged, that there might be no Stop or Delay given to the honeſt Workmen to come at the Fruit of their Labour.

Curia.

And accordingly the Rule was diſcharged, for this being after a Sentence in the Admiralty, this Court will not enter into the Examination of the Merits farther than what appears upon the Face of the Libel; for 'tis a conſtant Rule, that no Matter dehors the Libel ſhall be admitted as a Suggeſtion to ground a Prohibition after a Sentence in a Civil Law Court.

2 Inſt. 602. Salk. 547.

The King *verſus Bail of* Strudwick.

The Bail are not diſcharged till a *Committitur* of the Principal is entered.

UPON a Motion, that the Recognizance, entered into by the Bail of one Strudwick, might be eſtreated, the Caſe was:

ſſ. Strudwick, who was the Principal, gave a Recognizance with Bail, conditioned to keep the Peace for a Year, and afterwards to appear in this Court on the firſt Day of

this Term, which he did not; and therefore it was moved, that his Recognisance might be estreated, so that the Bail might be prosecuted.

It was insisted for them by their Counsel, that this Motion was irregular, because there was no Default of *Strudwick*'s Appearance entered, and the Court being of Opinion, that it was improper to offer any Thing against the Bail till the Default of the Appearance of the Principal was entered, and if they had any Thing to offer, the Time would be when a Scire facias was sued out, and it could not then be done till the Default of Appearance as aforesaid was entered.

Afterwards this Default of Appearance, *&c.* was entered, and then the Recognisance being estreated, a Scire facias was brought against the Bail; and it was insisted for them, that since the said Recognisance was given, the Defendant Strudwick had entered into another Recognisance to appear and answer an Information exhibited against him; upon which he was afterwards convicted, and committed to the Marshalsea, so that he being taken out of the Custody of the Bail by a legal Process of this Court, by that Means they are discharged, and that he could not be brought up, and rendered by them, because he was escaped out of Gaol.

'Tis true, there was no Commititur of the Principal entered, and if for that Reason the Court should be of Opinion, that the Bail were not discharged, then it was moved, that the Proceedings upon the Scire facias might by staped till the common Day of Estreats, because the Bail might have an Opportunity of retaking him within that Time.

The Chief Justice held, that where a Man is admitted to Bail, he is by Intendment of Law in their Custody, but when he is taken from them by the Process of this Court, then they are discharged. Curia.

All the other Judges were of a contrary Opinion, (viz.) that they are not discharged till the Commititur of the Principal is entered, for tho' he was committed upon the Conviction on the Information, he was as much in the Power of his Bail, as if he had been at large, or still in their Custody; for upon a Motion in this Court, they might have him brought up at any Time, and rendered back again in Discharge of themselves.

Afterwards upon another Day, it was moved that the Commititur of the Principal might be entered, so as the Bail might take Advantage thereof, and that the Proceedings on the Scire facias might be staped in the mean Time.

The Court would not ſtay the Proceedings on the Scire facias, but ordered that a Commiteitur ſhould be entered on the right Recogniſance, for there being two, (viz.) One for the Peace, and the Appearance of the Principal, which was forfeited for his not appearing; and the other for his Appearance to Anſwer the Information, upon which he was afterwards convicted; the Commiteitur muſt be entered on the laſt Recogniſance.

Parr *verſus* Purbeck.

Where a Writ of Inquiry may be ſet aſide, where not.

IN an Action of Covenant for Non-payment of Rent reſerved upon a Leaſe for Years, there was Judgment againſt the Defendant by Default; and upon a Writ of Inquiry executed, the Jury gave the Plaintiff but one Shilling Damages and no more, tho' he proved that the Defendant owed him 150l. for Rent.

The Reaſon why the Jury gave a Shilling and no more was, for that the Defendant took this Leaſe of the Plaintiff of a certain Piece of Ground, in which he (the Leſſee) covenanted to pay ſo much Rent; and the Leſſor covenanted, that he ſhould have ſuch a Sewer or Dam to keep Water, he (the Leſſee) intending to ſet up a Paper-Mill, but the Commiſſioners of Sewers had made the Water-courſe ſo narrow, that he could not have Water ſufficient for his Purpoſe; and being unwilling to ſue the Leſſor upon this Covenant he left the Land to the Leſſor; and thereupon another Perſon entered, and was poſſeſſed thereof, and ſet up a Corn-Mill, and the Miller paid the Rent; and all this being known to the Jury who were of the Neighbourhood, they gave the Plaintiff a Shilling and no more.

And now it was moved to ſet aſide this Writ of Inquiry for the Smalneſs of the Damages; for ſince this Action of Covenant was brought, and the Breach aſſigned for Non-payment of ſo much Rent in certain, the Jury were obliged to find the Whole; 'tis true, if it had been in an Action for Damages, they might have found Part only; and 'tis uſual to ſet aſide a * Writ of Inquiry for Smalneſs of Damages where no manner of Evidence is given why they ſhould be mitigated, which is this Caſe.

* *See* Poſtea Parr *verſus* Niblett. 213

Econtra.

The Counſel for the Defendant inſiſted, that the Execution of a Writ of Inquiry is not to be ſet aſide, and a new Writ of Inquiry granted for the Smalneſs of Damages given

by the first Jury, unless there is some Contrivance or sinister Management, and so is the Case in Salkeld Rep. 647.

Salk. 647.

If. In Covenant to pay a Sum certain (as in the principal Case), and that upon Default of Payment, it should be lawful for the Covenantee to enter, and take the Profits &c. The Defendant pleaded in Bar, that the Plaintiff did enter and take the Profits; and upon a Demurrer to this Plea, the Plaintiff had Judgment, and a Writ of Inquiry, and small Damages; and upon a Motion, a new Writ of Inquiry was awarded, because an Action of Debt might have been brought upon this Covenant, it being to pay a certain Sum, and in such Action the Jury upon a Writ of Inquiry must have given the whole Sum, unless the Defendant proves something in Mitigation, which was not done in that Case; therefore the Court looking upon it to be a Contrivance of the Jury awarded a new Writ of Inquiry; yet they held it to be a common Rule, that no new Writ of Inquiry shall be granted for too small Damages, if there was no Contrivance in the Case; for if it should, this Inconveniency might follow, (viz) The small Damages given by the first Jury might influence the second Jury to give greater.

Curia.

The Court was of Opinion to set aside this Writ of Inquiry, for tho' the supposed Breach of Covenant (on the Plaintiff's Side) was true, (viz.) That the Defendant had not sufficient Water to set up his Paper-Mill, and that had been given in Evidence to the Jury on the Writ of Inquiry; yet they could not have mitigated the Damages on that Account, much less when it was not given in Evidence.

'Tis true, the Lessee left the Land for that Reason; and another entered and possessed it, which Entry, &c. might have been given in Evidence upon the Trial of an Issue joined, but not to a Jury upon a Writ of Inquiry after a Judgment upon a Demurrer; neither did the Defendant give it in Evidence to the Jury, but pretends they knew it themselves.

'Tis admitted, that in Covenant where Damages are to be recovered, the Jury upon a Writ of Inquiry are the proper Judges of the Quantum of the Damages; and for that Reason the Court will not set aside their Inquiry, where they give small Damages; but 'tis otherwise where the Covenant is for Payment of Money, and the Sum is ascertained, because in such Case the Sum being certain, the Jury cannot lessen the Damages; and this is the constant Difference in such Cases, and 'tis the same as if an assumpsit had been brought

brought for Money upon a Note under Hand, for there the Jury cannot mitigate the Damages; if they do, the Court will set their Verdict aside; and so it was done in the principal Case upon Payment of Costs, &c. See postea Parr *versus* Niblett, S. C. 213

Anonymus.

Where *non pros* was entered without a *Misericordia.*

THE Plaintiff brought an Action in the Court of Common Pleas, and laid four Counts in his Declaration; the Defendant demurred to one of them, and the Plaintiff joined in Demurrer, and had Judgment, and then he entered a Nolle prosequi as to the other 3, but without any Misericordia, which the Defendant believing to be erroneous, he brought a Writ of Error in B. R. and assigned this Matter there, being a Precedent in * Coke's Entries, that 'tis erroneous.

* Co. Ent. 676.

Econtra.

It was argued in Support of this Judgment, that by the Statute of Jeofailes, Anno 16 Car. 2. no Judgment after Verdict, &c. shall be reversed for want of a Misericordia, and by the † Statute for Amendment of the Law, 'tis enacted, that no Judgment shall be reversed, or Writ of Inquiry of Damages stayed or reversed by Reason of any Matter which would have been aided by any Statute of Jeofailes in Case of a Verdict, so as an original Writ, or Bill or Warrant of Attorney is filed.

16 & 17 Car. 2. c. 8. † 4 & 5 Ann. cap. 16.

Now the Want of a Misericordia is Matter which is aided by the said Statute of Jeofailes in Case of a Verdict; and therefore 'tis within the aforesaid Act made for the Amendment of the Law; and the Judgment is not to be reversed where that Word is omitted.

Curia.

If the Entry of a Misericordia had been necessary at Common Law, there is no Statute of Jeofailes which Cures the Want of such Entry; for those Statutes extend to Judgments entered by Confession, nil dicit or non sum informatus, but the principal Judgment is neither of these, for 'tis a Judgment upon a Demurrer joined.

Now at Common Law there was no Need of entring a Misericordia in such Cases, because such Entry is only pro falso clamore, and here is no Colour of any false Complaint, because the Plaintiff says non vult ulterius prosequi; and as for that Case in the Lord Coke's Entries, many of them have been condemned; so the Judgment was affirmed.

Corniſh *verſus* Clerke & al'.

Scire facias brought againſt the Bail jointly, and a ſeveral Judgment againſt each of them.

THE Caſe, ſi. Two Perſons entered jointly and ſeverally into a Recognizance of 4000l. Bail for another; and afterwards the Plaintiff brought a Scire facias againſt both of them jointly, and had Judgment for 4000l. againſt each of them.

1 Lev. 225, 226.

And now it was objected, that this Judgment was erroneous, becauſe a ſeveral Judgment cannot be given upon a joint Scire facias, no more than upon a Bond.

'Tis true, a Recognizance may be joint and ſeveral (as this was) and ſuch a Recognizance may warrant a joint and ſeveral Scire facias; but yet a ſeveral Judgment can never be had upon a joint Scire facias againſt each of the Coniſors; for the Plaintiff might have brought a Scire facias againſt each of them ſeparately, and not againſt both jointly.

Curia.

The Court was of Opinion, that would be to multiply Actions, and that this was the conſtant Form, and ſo the Judgment was affirmed.

King & Ux' *verſus* Baſingham.

Where the Wife ſhall not be joined in the Action with her Husband.

AN Action on the Caſe, &c. was brought in the Common Pleas by Husband and Wife, in which he declared upon ſeveral Counts, and one of them was for Money lent to the Defendant by him (the Plaintiff) and his Wife, by his Conſent.

Upon Non Aſſumpſit pleaded, the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment, that the Declaration was ill, becauſe the Wife was joined in this Action with her Husband, which ſhe ought not to be; and that the Joining her in the Action being Matter of Subſtance, was not helped by this Verdict; for by this Means, if the Husband ſhould die, then what is recovered would ſurvive to her, when it ought to go to the Executor of the Husband.

But the Judgment was affirmed, and a Writ of Error being brought in B. R. the ſame Objection was made there; and that this Action was founded on a Contract made by the Wife, when by Law ſhe cannot make any Contract during the Coverture.

Sid. 346.

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Sid. 346.

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Econtra. It was argued in Support of the Action, that this Objection came too late, it being after a Verdict; and that it ought to be made good, if by any Construction it might; therefore it shall be intended, that the Husband and Wife were joint Traders, and that she lent the Money to the Defendant.

Cro. Eliz. 61. 2 Cro. 77, 205. 1 Roll. Abr. 32. Sid. 25. 2 Sid. 128. Allen 36. 2 Mod. 217. Besides, where a Promise is made to the Wife, if the Husband brings the Action for himself and his Wife, he makes that Promise good by his own Consent.

Curia. The Court was of Opinion, that the Wife ought not to be joined in this Action, unless there had been an express Promise made to her, or unless the Cause of Action did arise on her Skill or Knowledge.

Wrotham *Parish versus The Parish of* St. Olave.

Attachment against Parish-Officers for a Contrivance in Settling a poor Man and his Family.

THE Case, ſi. John Richards, and his Wife and five Children, were removed by an Order of two Justices, from the Parish of Capell to the Parish of Wrotham in Surrey, that being adjudged to be the last Place of their legal Settlement; and afterwards upon an Appeal to the next Quarter-Sessions, that Order was quashed, and thereupon the poor Man and his Family came back to the Parish of Capell, and by another Order were again removed to Wrotham; which Order being removed into B. R. by Certiorari, it was by the Consent of both Parties referred to the Judge of Assise, who, upon hearing the Evidence on both Sides, directed, that the Matter should be tried upon a feigned Issue, which was done accordingly at the next Assises, and the Parish of Wrotham had a Verdict; and so both the former Orders were quashed.

But the Parish of Capell being dissatisfied with this Verdict, procured the Parish Officers of St. Olave in Southwark, to permit this Man and his Family to dwell in a Tenement there, on Purpose that they might remove him to Wrotham, and accordingly they came into the Parish of St. Olave, and lived there some Time, and were afterwards removed from thence by an Order of two Justices to Wrotham, which Order was confirmed upon an Appeal to the next Sessions, so that by this Means the Parish of Capell was discharged of him, because

an Order confirmed upon an Appeal, makes a good Settlement in that Parish by whom the Appeal is brought, against all other Parishes whatsoever.

It was now moved, that this last Order might be quashed, and for an Attachment against the Church-wardens, &c. of Capell, for this Contrivance.

But the Court would not quash the Order, but made a Rule for them to shew Cause on such a Day why an Attachment should not go; and probably when they come to shew Cause, they may consent to have the Orders quashed; but they shewed no Cause, and so the Rule was made absolute. Curia.

The King *versus The Corporation of* Brecknock.

THIS was an Information in Nature of a Quo Warranto against Jones and Powell, for pretending to be Burgesses of Brecknock in Wales, and to shew by what Authority they claimed to be Burgesses, &c.

Verdict given upon an Information in Nature of a *Quo Warranto*, whether it may be set aside; all the Judges of *England* equally divided.

Upon Not guilty pleaded, the Cause came on to Trial at the Assises in Hereford; and upon hearing the Evidence, the Counsel for the King desired that the Matter might be found specially, for that it appeared by the Charter of this Corporation, that the Burgesses, and all other Officers thereof, should be chosen de Inhabitantibus, and that the Defendants Jones and Powell, were not Inhabitants of Brecknock.

But there being Evidence given, that the Usage had been against the Charter, the Jury gave a general Verdict upon the Usage, (viz.) That the Defendants were not Guilty.

And now it was moved to set aside this Verdict, for two Reasons; first, Because it was given against Evidence; and secondly, Because the Jury refused to find a Special Verdict, which they ought to have done when it was required; and because of the Difficulty of the Case, this Question was referred to all the Judges of England.

1. Whether a Verdict, by which the Defendant is found Not guilty on an Information in Nature of a Quo Warranto could be set aside, and a new Trial granted; and the Judges were equally divided, Two against Two in each Court, so that not one Court was unanimous in Opinion of either Side; but Six of them were of Opinion, that the Verdict might be set aside, and Six were of a contrary Opinion.

Curia.

And it being now moved again to ſet aſide this Verdict for the Reaſons before-mentioned, the Court was of Opinion, that ſince this was become a Queſtion, Whether it could be done, or not, it ought to be determined; that it was certain a Verdict in a criminal Caſe could not be ſet aſide for finding againſt Evidence; but then the Queſtion will be, Whether this Caſe is criminal.

Verdict in a criminal Cauſe cannot be ſet aſide.

And as to the other Reaſon for ſetting aſide this Verdict, which is, that the Jury refuſed to find the Matter ſpecially, there ſeems to be ſome Colour in it; for upon ſuch Refuſal, even a Verdict given by a ſpecial Jury, and upon a Trial at Bar hath been ſet aſide; and certainly it will not be denied, but that a Misdemeanor of a Jury will avoid their Verdict; and 'tis a Misdemeanor in them to refuſe the Finding a Special Verdict when deſired, becauſe every Man hath as much Right to have a Point of Law determined by the Judges, as he hath to have any Matter of Fact tried by a Jury; and it would be unreaſonable, that it ſhould be in the Power of any Jury to hinder the Trial of Matters in ſuch a due Method as the Law preſcribes; therefore a Rule was made, that the Plaintiffs ſhould ſhew Cauſe why this Verdict ſhould not be ſet aſide.

For the Defendants, why the Verdict ſhould not be ſet aſide.

And upon another Day the Counſel for the Defendants offered the following Reaſons why this Verdict ought not to be ſet aſide, and a new Trial granted.

Firſt, For that it was never yet determined, that any Court could ſet aſide a Verdict, or grant a new Trial where the Defendant was acquitted in a Quo Warranto brought againſt him for uſurping any Franchiſe; and an Information in Nature of a Quo Warranto is a criminal Proſecution, in which Proſecutions the Court will never ſet aſide any Verdict, and grant a new Trial.

† Raym. 34. 1 Lev. 9. S.C. Sid. 149, 153. S. C.

It was ſo adjudged in the Caſe of The † King and Read, which was an Information againſt the Defendant for Perjury, in giving falſe Evidence at a Trial of a Cauſe in B. R. he was acquitted upon the Information; and upon a Motion for a new Trial upon an Affidavit made, that ſome material Witneſſes to prove the Perjury were abſent, it was not granted.

* 1 Lev. 124.

The Caſe of The * King *verſus* Sir John Jackſon, went farther than any Caſe of this Nature, which was an Action of Treſpaſs brought by the Plaintiff Jackſon againſt one Primate; and the Plaintiff had a Verdict, with which the Defendant Primate being not ſatisfied, he indicted the Witneſſes

of the Plaintiff for Perjury; which being ready for Trial, Sir John Jackſon ordered his Servants to beat and impriſon thoſe Witneſſes who were to prove the Perjury, ſo that they could not be at the Trial; and thereupon the Defendants were acquitted.

Now tho' all this Matter appeared to the Court, upon a Motion for a new Trial, it was not granted, becauſe it was in a criminal Caſe in which the Parties were acquitted; but an Information was ordered againſt Jackſon who was convicted and fined.

And this is likewiſe a criminal Proſecution in the very Nature of it; 'tis true by the Statute of Queen * Anne, a Man is admitted to try his private Right in an Information; the Words of which Statute are, (viz.) If any Man ſhall uſurp an Office in a Corporation, it ſhall be lawful for the proper Officer of the King's Bench Court to exhibit an Information againſt him in the Nature of a *Quo warranto* at the Relation of any Perſon deſiring to proſecute, who ſhall be mentioned in ſuch Information as Relator againſt ſuch Uſurper, and to proceed as uſual, *&c.*

* 9 Annæ cap. 20.

And tho' by that Statute, an Information hath the Quality of a civil Action, (viz.) If the Defendant ſhall be found guilty, he ſhall pay Coſts; and ſo likewiſe ſhall the Relator, if Judgment be given againſt him; yet ſtill the Proſecution is for an Offence of a mixt Nature, and the civil Part cannot be tried without the Trial of the criminal Part; and there is no Difference between an Information in the Nature of a Quo warrato, and an Information meerly criminal, as to the Setting aſide a Verdict in either.

And hitherto ſuch Informations have been accounted criminal Proſecutions, and that by the plain Opinion of the Legiſlature; for 'tis well known, that Actions qui tam, &c. Informations and Indictments are excepted out of the Statute of Jeofailes; and the Reaſon is, becauſe thoſe are all criminal Proſecutions, and for that Reaſon they would not have extended to Informations in Nature of a Quo warranto; and therefore it was expreſly provided by the Legiſlature, that all Statutes of Jeofails ſhall not extend to ſuch Informations.

9 Ann. c. 20. For the Amendment of the Law.

'Tis true, upon the firſt Motion of this Matter in Court, there were ſome other Reaſons offered for ſetting aſide this Verdict, for ſome other Misdemeanor of the Jury, (viz.) that after one of them was ſworn, and had heard Part of the Evidence for the Proſecutor, he went out of the Hall to piſs, and was abſent about a Minute; and that when they all withdrew

to consider of a Verdict, and could not agree, they all consented to poll, and to find for that Side on which the Majority should fall, and that seven polled for the Defendant; and thereupon they found a Verdict for him.

Now as to this Matter, 'tis of no Weight to set aside this Verdict, it was not so much as mentioned when the Verdict was brought in, nor was any Exception made by the Judge (who tried the Cause) to any of the Jury who were impanelled to try the like Issue the next Day, between the King and Powell.

The chiefest Reason for setting aside this Verdict was, that it was given against Evidence, and their Refusal to find a special Verdict when required; for it being expressly provided by their Charter, that the Burgesses of this Corporation should be chosen de inhabitantibus, but the Usage being contrary, they gave a general Verdict upon the Usage, when they ought to have found the Matter specially.

Now in Answer to the first Reason, 'tis the Constant Rule never to set aside a Verdict for being against Evidence, unless it was insisted to be so at the Trial, especially after a Defendant is acquitted; and then as to the other Reason, (viz.) their finding against the express Provision of their Charter, when they ought to have found that Matter specially, they might have cured it by special Pleading, if they had thought it proper so to do.

But this is not a Finding against their Charter, because those Persons who lived within such Precincts, and had usually been chosen Burgesses, and exercised other Offices in that Corporation, may properly be said to be Inhabitants thereof within the Meaning of this Charter; therefore this Court without some extraordinary Inducement, or great Inconveniency shewn, will not make a Precedent to take away the Plea of Autrefoits acquit from the Subject, which is a Fence allowed by the Common Law against the Insults of Power.

Econtra to set aside the Verdict.

On the other Side it was argued to set aside this Verdict, that an Information in Nature of a Quo warranto was not a Criminal, but a civil Prosecution; 'tis true, the * Statute is, that if the Defendant is found guilty of an Usurpation, the Court may fine him; but that doth not make it a criminal Prosecution, because the Fine is only a Consequence, that the Right was not in the Person who is to pay it; for the Right is the only Thing, and probably for that Reason, the Counsel on the other Side did not so much as mention the Fine.

*9 Ann. c. 20.

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That which was now principally insisted on was, the Finding against the express Words of the Charter, which appoints that the Burgesses shall be chosen de inhabitantibus of the Corporation, when the Defendants were not Inhabitants thereof; 'tis true, the Charter confirms the Usages there, but it cannot confirm such Usages which are against the express Words of the Charter it self.

So that the Question is, Whether Persons who are not Inhabitants of the Corporation could be good Burgesses thereof by Usage, which ought to have been found specially, because the Usage being inconsistent with the Charter, must for that Reason be quite destroyed as in the Case of the King and Philips, where there were two Charters, and the last contrary to the first, it was resolved that the first was merged in the last.

So in the principal Case, tho' it had been an ancient Usage to choose Burgesses not dwelling in that Corporation; yet such Usage must be merged in the Charter, for that abrogates all the Usages and Customs which are inconsistent with the Charter; and therefore they can never subsist against it.

As to the Misdemeanor of a Juryman, 'tis true, if he eats or drinks whilst the Verdict is under Consideration, he may be punished, but that doth not make it void, tho' 'tis otherwise if he absent himself, because he cannot hear all the Evidence, so as to be rightly informed of the whole; for no Man knows what Part of an Argument, or what Sort of Evidence may convince him; therefore he ought to hear the whole, because one Part may either strengthen or weaken the other.

Besides, the Polling by the Jury is like the Fillip of Cross and Pile, if Cross for the Plaintiff, if Pile for the Defendant; and certainly where Verdicts are given by the Majority of the Poll, they cannot be given upon due Consideration of the Cause; therefore if there was nothing else in the Case, that is a sufficient Reason to set aside this Verdict; but it could not be objected at the Trial, because this Misdemeanor was not then known.

As for the Case of Sir John Jackson, who ordered his Servants to beat and imprison Primate's Witnesses, because they should not be at a Trial to prove Sir John's Witnesses guilty of Perjury; and thereupon those Witnesses were acquitted, and no new Trial was granted; 'tis true, this is reported in Levinz, but there is no clear Reason to support the Judgment given in that Case; tis no more than for a Man to be discharged of one Crime by committing another; for the

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Defendants in that Case were acquitted of Perjury by beating and imprisoning the Witnesses who were to prove it at a Trial ready to come on, and no new Trial was granted, because it was in a criminal Case, but admitting it to be so in a Case meerly Criminal; 'tis not so in an Information in Nature of a Quo warranto, for if it should, it would be of the utmost ill Consequence to all Corporations, and it might endanger our very Constitution.

But 'tis not a settled Rule, that a new Trial cannot be granted in a criminal Case, where the Defendant hath been acquitted; for if the Acquittal was upon a Trial without due Notice, certainly a new Trial might be granted, and the rather because no Bill of Exceptions will lie where the Crown is concerned in the Prosecution.

Curia. The Court first answered the Objections, and said, as to the Misbehaviour of the Juryman who was absent for a Minute, it was not punishable, but if it was, it shall not avoid the Verdict, and as for their Polling and giving a Verdict where the Majority fell, 'tis not like the Case of the Fillip for a Shilling, if Cross for the Plaintiff, if Pile for the Defendant; because that was a Verdict which depended meerly on Chance; but the * Polling was only giving Credit and Weight to the Authority of the greater Number of the Jury.

* One of the Judges was of a contrary Opinion, and that it was like the Case of Cross and Pile; for the Jury should convince on another by good reasoning.

As to the Objection, that the Jury should have found a Special, and not a general Verdict upon the Usage, it doth not appear, that the Judge who tried the Cause directed them to find the Matter specially; for he might think that there being no negative Words in the Charter to exclude their ancient Usages, that such Customs and Usages, which they had before the Charter, did still subsist; so that this discharges them from the Imputation of finding against the Directions of the Judge; but if he had directed them to find the Matter specially, in such Case they ought to find it so, because every Subject hath a Right to have a Point of Law determined by the Court, and not to have it hudled up in a general Verdict by a Country Jury.

The Objection which goes to the Whole is, that a new Trial cannot be granted in a criminal Cauſe where the Defendant is acquitted; now, whether it may be granted, or not, is a Queſtion fit to be conſidered; 'tis true, 'tis generally held that it cannot; and ſo it was adjudged in Sir John Jackſon's Caſe, but that is a very extraordinary Caſe, for 'tis inconſiſtent with Reaſon not to grant a new Trial where a Man is acquitted by his own Artifice of a Crime not capital, for 'tis (as hath been obſerved), that where a Man hath committed one Crime, he ſhall have it in his Power to avoid Juſtice by committing another.

But admitting that Caſe to be Law, then the Queſtion will be, Whether a Proſecution by an Information in Nature of a Quo Warranto, is a criminal Cauſe, or not, upon which Queſtion the Judges of England have equally been divided.

But now the Chief Juſtice was one of the Judges, who was for granting a new Trial in the Principal Caſe; becauſe, tho' this was an Information of that Nature, yet the principal Matter in it was Matter of Right; and the Fine to be impoſed on the Uſurper, if 'tis found againſt him, is only the Conſequence of ſuch Right.

Two Judges were againſt Granting a new Trial, becauſe they held this to be a criminal Proſecution, as much as an Indictment is for a Nuſance; for certainly that is criminal, tho' 'tis founded on a Civil Right.

And two Judges were likewiſe of Opinion, that this was finding a Verdict againſt Law, and therefore a good Cauſe to ſet it aſide; for as far as this Charter differs from the former Uſages before it was granted, ſo far it extinguiſhes thoſe Uſages and Conſtitutions, and implies a Negative, that they ſhall be no longer obſerved, ſo that the Jury have found a Verdict againſt the Charter, which is a ſufficient Cauſe to ſet it aſide, becauſe 'tis a Finding againſt Law.

But as for the great Point, Whether a new Trial could be granted upon an Acquittal of the Defendant on an Information in Nature of a Quo Warranto (as this was), there was no Opinion given, becauſe all the Judges of England were equally divided upon that Point; but it was held, that no Argument could be drawn from the Fine which the Court may impoſe upon the Uſurper if he is found guilty, that this Information is a criminal Proſecution, becauſe there is a Fine impoſed on every Defendant found guilty of a Treſpaſs Quare vi & armis, &c.

But

Judgment.

But afterwards, on the last Day of Hillary-Term following, the Chief Justice declared, that it was the Opinion of the whole Court to grant a new Trial, if it could be granted by Law; but it being a Point wherein the Judges had so much differed, it ought to be well considered, because it affected all the Corporations in England; and that it was never yet known, that a Verdict was set aside, by which the Defendant was acquitted in any Case whatsoever upon a criminal Prosecution.

Turner *versus* Turner.

THIS was a Trial at Bar upon a feigned Issue directed out of Chancery, wherein the only Question was, Whether David Turner, the Grandfather both of the Plaintiff and of the Defendant had cancelled a Will made by him in the Year 1716, or not.

The Case was thus: ſt. David Turner being seised of Gavelkind Lands in Kent, to the Value of 400 l. had Issue George Turner, his eldest Son, by one Venter; and David Turner his youngest Son, by another Venter, both of which Sons died in the Life-time of their Father David Turner, the Testator.

George, the eldest Son by the first Venter, left Issue the now Plaintiff, and David the eldest Son by the second Venter, left Issue the Defendant; and David Turner, their Grandfather, anno 1716, made a Will in Favour of George his eldest Son by the first Venter, which, as was insisted on by the Plaintiff, was not cancelled by the Testator in his Life-time; but by the now Defendant after the Death of the said Testator, that the Estate might equally descend between them.

But upon full Proof, that the Testator cancelled his Will in his Life-time, and said, that he intended his Estate should equally descend and come to both his Grandchildren, the Defendant had a Verdict.

Goods were replevied which were distrained upon a Conviction for keeping Dogs and Nets, not being qualified.

The King *versus The Town-Clerk of* Guilford.

ONE Burchett was convicted by a Justice of Peace for keeping Dogs, Nets, and Ferrets, to catch Conies, not being qualified, &c. and by a Warrant from the said Justice,

his Goods were diſtrained for the Forfeiture; and whilſt they were in the Poſſeſſion of the Conſtable, and before they were ſold, the Town-Clerk granted a Replevin to take them from the Conſtable.

And now it was moved to ſet the ſaid Replevin aſide, becauſe Goods thus taken by Diſtreſs on ſuch Convictions are irrepleviable, and for an Attachment againſt the Town-Clerk.

The Court would not ſet aſide the Replevin, but made a Rule to ſhew Cauſe why an Attachment ſhould not go.

DE

Term. Sanct. Hill.

Anno 10 Georgii, 1724.

The King *verſus The Mayor of* Kingſton upon Hull.

Mandamus; ſeveral Perſons cannot be joined in one *Mandamus*.

UPON a Motion laſt Term, a Rule was made, that a Mandamus ſhould go to the Mayor of Kingſton, to aſſemble and keep Courts, and to do the Office of that Corporation; and in drawing up the Writ, the Clerk added theſe Words, (viz.) And to admit all thoſe to their Freedom who have a Right to be free of that Corporation.

And now it was moved to ſet aſide this Rule, becauſe all who have a Right to be free cannot be joined in one Mandamus, as it was reſolved in the Caſe of the nine Common Council-Men of Cheſter, anno 6 Will. 3. becauſe every one hath a ſeparate Right; therefore Two, or more, could not be

joined in this Writ; for where several are joined, there can be no Traverse taken, because no one is Party to it.

Curia. The Court was of Opinion, that the Mandamus was ill, and not warranted by the Rule of the Court; therefore if it had been returned, it should have been quashed; but being not returned, it shall be superseded, that the Mayor may not be obliged to make a Return.

The King *versus The Mayor of* Whitchurch & al'.

Trial at Bar denied. A Rule was made against the Mayor and other Officers of the Borough of Whitchurch, to shew Cause why an Information should not go against them, being chosen into their respective Offices, and not dwelling in the said Borough; and by a Jury of Non-residents being impanelled for that Purpose, against which Choice the Inhabitants of this Borough protested, it being contrary to their antient Usage, as was now suggested.

The Counsel for the Defendants shewed for Cause against this Rule, that all the Officers of this Borough are to be constantly chosen by Freeholders thereof; and that some of the Inhabitants who were Freeholders, were summoned to be of the Jury, but they refused to appear, pretending they would not serve with those who were not Inhabitants of the Borough, but Out-dwellers, and therefore excluded from being of the Jury; and thereupon others were returned who would serve.

That ever since the Year 1641, the Out-dwellers who had Freeholds in the Borough, were returned Jurymen, which appeared by the Entries made in their Borough-Books, and such Out-dwellers had served in all the Offices thereof.

That Whitchurch is an antient Borough by Prescription, and that the Jury thus impanelled, as aforesaid, did not serve in a Court-Leet, but in a Borough-Court; for if it had been to serve in a Leet, then it must be by Inhabitants, but that in a Borough-Court none but Freeholders are to be of the Jury, which Freeholders might be Out-dwellers, so as they had a Freehold within the Borough.

That all the Jury had Freeholds in the Borough, and by such a Jury assembled at a Borough-Court, the Defendants were lawfully chosen.

Curia. But the Rule was made absolute by two Judges against one, there being but three in Court; for this being a Matter of Right, it was fit to be tried by a Jury who are the

proper Judges of Evidence; and upon another Day the Court was moved for a Trial at Bar upon some Affidavits, that the Freehold to the Value of 1000l. might come in Question, but it was denied for no other Reason, but that it was a Borough Cause.

The Chamberlain of London *versus* Green.

A By-Law was made in London, that no Person but a Freeman of that City should exercise any Trade or Art therein under such a Penalty; and now an Action of Debt was brought, for that Penalty against the Defendant Green, upon which he was committed; and upon a Motion for an Habeas Corpus, it was insisted for him, that he was a Musician, and attended with other Masters in Musick at the Feast of Clergymens Sons, being employed by the Stewards of the said Feast; and because they did not likewise employ the City Musicians, therefore they set up this Prosecution against the Defendant, and would now extend this By-Law to Musick, which is a Science, and no Trade; and if this should be allowed, they may extend it to Lawyers who are not Freeman, and who attend the Courts there, for the Law is a Science, and so is Musick. Debt upon a By-Law for exercising a Trade, &c. the Defendant being a Musician, which is a Science.

The Arguing of a Lawyer is Wind-Musick, and no Handicraft Trade, so the Habeas Corpus was granted. Curia.

And afterwards upon the Return thereof, it was argued for the Plaintiff, that a Procedendo should be granted, for that the Commitment was good, and so was the By-Law; and that this Court cannot try whether the Case of the Defendant Green is within this By-Law or not; because 'tis triable only in London where the Plaintiff must declare in a proper Court, and on a special Custom to make By-Laws, for otherwise all such Laws might be controverted in this Court.

On the other Side the Counsel for the Defendant said, that the Plaintiff's Counsel had touched very lightly upon the String; for that the Profession of Musick was not within this By-Law which extended only to Handicraft Trades; and that Musick was not a Trade, but a Science, in which Science Degrees were taken in all the Universities in Europe. Econtra.

The Court was of Opinion, that this was a good By-Law, and as such hath been allowed for several Years past; Curia.

and therefore a Procedendo was granted, but with this Direction, that the Plaintiff ſhould admit the Matter to be found ſpecially at the Trial, otherwiſe the Court would not grant another Procedendo in the like Caſe.

Afterwards the Cauſe was tried in London, and at the Trial a Difference was taken between Exerciſing ſuch Handicrafts for Lucre and Gain (which was the Defendant's Caſe) and Exerciſing them for Diverſion and Amuſement, and that the one was within the By-Law, and the other not; and thereupon the Plaintiff had a Verdict and Judgment, and afterwards the Defendant took his Freedom.

Morſe *verſus* Sury.

Award, where good.

IN an Action of Debt upon a Bond for Performance of an Award where the Submiſſion was of all Actions, &c. between the Plaintiff and Defendant; upon nullum arbitrium pleaded, the Plaintiff replied, and ſet forth the Award made by the Arbitrators on ſuch a Day of all Actions between the Plaintiff and the Defendant and his Wife, wherein they awarded, that the Defendant ſhould pay 20l. to the Plaintiff on ſuch a Day, in full Satisfaction of all Law-Charges due to him by the Defendant's Wife as Executrix of one Bodily her firſt Husband; and that both the Plaintiff and the Defendant ſhould equally pay the Charges of making the Award, and that they ſhould execute mutual Releaſes; and the Breach aſſigned was, that the Defendant had not paid the 20l. on the Day, upon which they were at Iſſue, and the Plaintiff had a Verdict.

It was moved in Arreſt of Judgment, that the Bond of Submiſſion was not good, becauſe it ſhould have been of all Actions between the Plaintiff and the Defendant and his Wife; but this was of all Actions between the Plaintiff and the Defendant only; ſo that if the Wife ſhould ſurvive her Husband the now Defendant, ſhe is ſtill to pay the Law-Charges, and not the Executor of the Husband; for this Award is no final Determination as to her, nor to him neither, if he ſhould ſurvive his Wife, becauſe it was in Satisfaction of all Law-Charges upon the Account of the Wife as Executrix of her former Husband, (who had put the Plaintiff to ſome Expences in defending a Suit at Law) which being a perſonal Tort, died with the Husband.

1 Roll. Abr. 246.

It was argued for the Plaintiff that this was a good Award, and as to the first Objection, that the Submission was of all Actions between the Plaintiff and the Defendant only, when it should have been between them and the Wife of the Defendant, certainly the Submission is good, notwithstanding that Objection; because upon the Defendant's Intermarriage with his Wife, who was the Widow and Executrix of Bodily her first Husband, the Plaintiff had an immediate Demand on him. Econtra. *See* 2 Cro. 447.

And the Court being of that Opinion held the Award was good; and so the Judgment was affirmed. Curia.

Parr *versus* Niblett.

See antea Parr *versus* Purbeck. S. C. Writ of Inquiry set aside for too little Damages.

AFTER a Writ of Inquiry was executed, it was set aside, because the Jury gave too little Damages; and a Rule was made, that on Payment of Costs, a new Writ of Inquiry might be executed, which was done, but without paying the Costs.

Therefore it was now moved, that this last Writ of Inquiry might likewise be set aside, and a Rule being made for that Purpose, unless Cause shewed on such a Day why it should not, it was now shewed for Cause, that the Plaintiff had done all in his Power to get the Costs taxed, but could not prevail; and that the Defendant's Attorney promised him, that he would take Notice of executing this Writ of Inquiry, as if the Costs had been already paid; therefore it was now insisted, that upon Payment of Costs, the Rule might be discharged.

It was said on the other Side, that this second Writ of Inquiry was to be executed upon Payment of Costs, and not otherwise, and that the Costs not being paid, that Writ could not be executed. Econtra.

The Court ordered the Attornies on both Sides to attend the Master of the Office, and that the Plaintiff should pay what Costs the Master should tax, and that upon Payment thereof, the Rule for setting aside the Writ of Inquiry should be discharged. Curia.

The

The King *verſus* Oland.

Upon an *Habeas Corpus* a Child was delivered to the proper Guardian.

UPON a Motion for an Habeas Corpus to be directed to the Defendant, to bring up the Body of a Child about ſix Years old into this Court, which ſhe (the Defendant) unjuſtly kept from the Guardian;

The Caſe was, (viz.) This Child was left to the Care and Charge of the Defendant, by her Mother, when it was about two Years old, and hath been carefully educated by her ever ſince; that her Father died about ſix Months paſt, and left the Charge of this Child to his own Brother, the preſent Guardian, who is entitled to the Eſtate, if the Child ſhould die without Iſſue; ſo that he is not a proper Perſon to be Guardian.

Beſides, an Habeas Corpus is a Writ for no other Uſe but to ſet Perſons at Liberty, and there is no Reaſon why it ſhould be granted in this Caſe, becauſe the rightful Guardian hath a proper Action to recover the Child; 'tis true, the Court ex debito Juſtitiæ, is to grant it, but the Merits of the Cauſe ſhall not be tried upon it.

Curia.

This Child, who wants Diſcretion to chooſe a Guardian, hath therefore no Liberty of Election; and in ſuch Caſe, when ſhe is brought up hither by Habeas Corpus, the Court muſt chooſe a Guardian for her; and this is not the firſt Time, that upon a Return of an Habeas Corpus, Perſons have been delivered by this Court to them who have a Right to receive them; it was done by the Lord Chief Juſtice Holt, and it was done in the Lady Hariot Berkley's Caſe, upon the Return of an Habeas Corpus, it being ſuggeſted, that ſhe was married; it was done in the Lady Rawleigh's Caſe, who was detained by her Husband againſt her Will, both which Ladies the Court left to their own Election, becauſe they were both of Diſcretion.

ante. 22

And likewiſe in that Caſe where the Lord Angleſea deviſed his Eſtate to his Daughter, and appointed who ſhould be her Guardian, and expreſly declared in his Will, that if ſhe lived with her Mother, Half her Eſtate ſhould be forfeited; yet this Court would not relieve; but ſhe being brought up by Habeas Corpus, was left to her own Choice, Whether ſhe would live with her Mother, though by her living with her ſhe was to forfeit Half her Eſtate.

But in the principal Case the Court would make no Rule, because the Guardian was not in Court; but on another Day he came into Court, and then the Child was delivered to him without farther Argument.

Plunkett *versus* Gillmore.

THIS was a special Action on the Case brought by the Plaintiff in Ireland; the Declaration was, that he (the Plaintiff) kept a Tavern in Dublin, and that the Defendant procured a Soldier to dress himself in Woman's Clothes, and so to personate a Woman, and then to come with another Soldier to the House of the Plaintiff, and to call for Wine, and soon afterwards he (the Defendant) procured another Soldier to come into the Room where the other Two were drinking, and to claim that Soldier in Woman's Clothes to be his Wife, and by this Means to quarrel with the other, and to cry up the Tavern to be a Bawdy-house, which brought the Mob together, who were likely to break his (the Plaintiff's) Windows, and that there is a Custom in Dublin to cart Bawds. Special Action on the Case for representing a Tavern to be a Bawdy-house.

Upon the general Issue pleaded, the Plaintiff had a Verdict and Judgment in the King's Bench Court in Ireland; and upon a Writ of Error brought in this Court, it was said by his Counsel, that it did not appear by the Plaintiff's Declaration, that he had any Cause of Action, for he only set forth, that the Mob were likely to break his Windows, which is no positive Allegation, that they did break them, and therefore the Judgment ought to be reversed.

But the Court, without any farther Argument, affirmed the Judgment, for the Declaration set forth a Custom in Dublin for Bawds to be carted, therefore to represent a Tavern to be a Bawdy-house, may be injurious to his Trade as a Vintner, by which he may be very much damnified, and by Consequence hath a good Cause of Action. Curia.

The King *versus The Corporation of* Penryn *in* Cornwal.

UPON a Motion for two Informations in Nature of a Quo Warranto against two Persons who pretended to be Mayors of this Corporation; and upon an Affidavit, that the Information in Nature of a *Quo Warranto.*

the Mayor in Poſſeſſion was not duly elected by a Majority of the capital Burgeſſes; there were two Rules made, that ſuch Informations ſhould go againſt thoſe two Perſons, unleſs each of them ſhould ſhew ſome good Cauſe to the contrary, which Rules were afterwards made abſolute againſt both the ſaid Perſons.

And upon another Motion for the like Informations againſt Two other Perſons, who pretended to be capital Burgeſſes of the ſaid Corporation, but were not, for that one of them had not taken the Oaths to the Government, and the other was amoved from his Office above two Years laſt paſt, and yet both of them voted at the Election of the Mayor in Poſſeſſion, by whoſe Votes he had a Majority; and the Counſel inſiſting that theſe two laſt Informations might be firſt tried, the Chief Juſtice was of Opinion not to grant them, becauſe at the Trial of the Right of the Mayor, the not Taking the Oaths by one of the Burgeſſes, and the Amotion of the other, might be given in Evidence.

But the Counſel ſtill inſiſting, that there might be an Inconvenience in this Matter, for if the Judge who ſhall try the Right of the Mayor ſhould be of Opinion, that thoſe Things could not be given in Evidence at ſuch Trial, then the Jury would certainly find againſt the Right of one of the Mayors; and 'tis probable that though theſe two Perſons were not capital Burgeſſes when the Mayor was elected, for the Reaſons before-mentioned, yet they might have done ſome corporate Acts as ſuch, and ſo might be accounted capital Burgeſſes de facto, and therefore their Right as ſuch may not be admitted to be litigated at the Trial of the Right of the Mayor.

Curia. And of this Opinion were the other Judges, (viz.) That at the Trial of the elected, the Right of the Electors ſhould not be inquired into or given in Evidence; and therefore the moſt proper Method was firſt to try the Right of the Electors upon an Information in Nature of a Quo Warranto, which ought to go againſt thoſe two Perſons who pretended to be capital Burgeſſes; and thereupon it was granted to try their Right firſt.

Briggs *verſus* Greenhill *and* Bonger.

Treſpaſs againſt two Defendants, for Breaking and Entring the Plaintiff's Cloſe, &c. and Taking his Cattle, &c. and converting them to their own Uſe.

Treſpaſs againſt two Defendants, &c. for Taking his Cattle, and converting them.

One of the Defendants ſuffered Judgment to go by Default, and the other Defendant Greenhill juſtified the Entry and Taking the Cattle by Diſtreſs for Rent due and in arrear to Bonger, reſerved upon a Leaſe made by him to the now Plaintiff; and that he, the Defendant Greenhill, ſold the Cattle which he had diſtrained for the Rent, by the Leave of the Plaintiff himſelf, from whom the Rent was due.

The Plaintiff took Iſſue upon his Licence to ſell, and the Jury found for the Defendant, (viz.) That he had Leave to ſell the Cattle.

And now it was moved, that Judgment might be entered for the Plaintiff, becauſe the Defendant's Plea was ill, in not anſwering the Treſpaſs; for the Licenſe to ſell was only a Diſcharge of the Converſion which was ſubſequent to the Treſpaſs, and therefore not anſwered by this Plea; and by Conſequence the Licenſe doth not cover the whole Cauſe of Action, but only Part of it; and that is the Converſion, when the Juſtification ought to go to the Whole.

Beſides, this being an Action of Treſpaſs, if one of the Defendants in ſuch Action had pleaded Not guilty, and it ſhould be found for him, yet the Plaintiff might have Judgment againſt the other; and this could not be hindered by any Iſſue taken upon a collateral Point.

7 Ed. 4. 18. 2 Cro. 134. 1 Lev. 45.

'Tis true, in an Action of Debt or Covenant, Judgment ſhall be arreſted where no Cauſe of Action appears for the Plaintiff on the Face of the Record; but 'tis not ſo in an Action of Treſpaſs againſt Two, becauſe one of them may be guilty of the Treſpaſs, and the other not; therefore in the principal Caſe the Juſtification ought to have gone to the * whole Treſpaſs; but here it went only to Part, and that was to the Converſion, for which Reaſon the Plaintiff ought to have Judgment.

* 3 Rep. 52. The Plaintiff counted of an Eſcape in *London*; the was not anſwered.

Defendant juſtified the Retaking in *Devonſhire*: Adjudged, that the Eſcape Eſcape. *See* 8 Rep. 120.

Beſides, this Plea is ill for another Reaſon, (viz.) Becauſe 'tis not averred, that the Leaſe upon which this Rent

was reſerved, and for which the Diſtreſs was taken, is ſtill ſubſiſting, and not expired; for if 'tis, then the Diſtreſs was unlawful.

Econtra. On the other Side it was argued, that this Juſtification was entire, and went to the whole Treſpaſs, for the Entring and Taking the Cattle is juſtified by a Diſtreſs for Rent, which Part of the Plea was admitted on all Sides to be good, and the Converſion was anſwered by the License which the Jury had found; ſo that upon this Record it doth not appear, that the Plaintiff had any Cauſe of Action, therefore the Defendant muſt have Judgment.

'Tis true, the other Side would diſtinguiſh this Caſe from an Action of Debt or Covenant; but yet where on the Record it ſelf it appears, that the Plaintiff in Treſpaſs had no Cauſe of Action, 'tis the ſame Thing; and tho' it ſhould be admitted, that this Plea doth not cover the whole Action; yet the Jury having given entire Damages for the Converſion as well as for the Entry, the Plaintiff can never have Judgment on this Record.

So the Judgment was affirmed.

Mordant *verſus* Small.

ERROR of a Judgment given in the Court of Common Pleas in an Action of Covenant brought by the Plaintiff on a Deed-Poll, in which Action the Plaintiff declared, that in and by the ſaid Deed, the Defendant covenanted to pay 15000 l. for ſo much Stock in the South-Sea Company, which the Plaintiff covenanted to transfer on the 21ſt Day of September, &c. and at ſuch a Place, at which Time and Place the Defendant covenanted to receive the Stock; then he (the Plaintiff) ſets forth the Cuſtom of that Company to transfer the Stock at the South-Sea Houſe, in ſuch a Method and at ſuch Hours, and avers, that he (the Plaintiff) was at the South-Sea Houſe, &c. on the 21ſt Day of September, & obtulit then and there to transfer the Stock, and ſtayed there from Nine of the Clock in the Morning of that Day, until Two of the Clock in the Afternoon, and till the Books were ſhut; but that the Defendant, or any other Perſon for him, was not there to receive or accept the ſaid Stock, and to pay the Money ad damnum, &c.

And upon a Demurrer to this Declaration it was objected, that it did not appear that the Plaintiff had done all which he was to do, to entitle himſelf to this Action, becauſe in all

Conditions and Covenants to do or perform a Thing on a certain Day, the last Hour of that Day is the Time of the Performance, unless another Time is requisite from the Nature of the Thing to be performed, or from the Contract it self, which (if that is the Case) ought to be shewed by the Plaintiff; therefore he should have set forth, that he had actually transferred, or tendered to transfer the Stock on the last Hour of the Day on which it was agreed to be transferred, and likewise at the very Place appointed to transfer it, which he had not done; 'tis like the Case where one covenanted to make a Feoffment to another on such a Day, and before that Day came, the Covenantor was disseised, yet that doth not discharge the Covenant.

So that the Plaintiff having set forth the Method of Transferring, should also have shewed the Time when the Transfer was to be made; and the rather, because the Court cannot take Notice of any special Time for that Purpose; therefore, not shewing that he was ready at the Place where the Transfer was to be made, and that at the last Instant of Time, and there and then tendered to transfer the Stock, his Declaration is ill.

'Tis true, he sets forth, that he was at the South-Sea House on the 21st Day of September, & obtulit to tranfer, &c. which is an obtulit on that Day indefinitely, and not on the last Hour of the Day, that being the proper Time of Tender.

But if he had set forth, that he was there from Nine in the Morning till Two in the Afternoon, & obtulit to transfer, probably that might have related to the last Instant of the Day, in which the Transfer was to be made; but he only sets forth, that he stayed there from Nine in the Morning till Two in the Afternoon, &c.

The Court was of Opinion, that there must be a Tender to transfer this Stock, and that an actual Transfer was not necessary, unless the Person to whom it was to be made, was at the Place and Time ready to accept it; and if so, then the Time of Tender is the last Hour of the Day on which the Stock was to be transferred, and the Plaintiff having omitted that Time in his Declaration, cannot be entitled to this Action. Curia.

Pocklington *versus* Hatton.

SIR Thomas Hatton, the Testator, made a Will in Favour of the Defendant, and afterwards purchased more Lands, and then he made a Codicil, and disposed some Part of his personal Estate, but did not mention the purchased Lands.

After the Death of the Testator, his Heir at Law, who was the Lessor of the Plaintiff, brought an Ejectment, and the Judge who tried the Cause being of Opinion for the Plaintiff, the Counsel for the Defendant tendered a Bill of Exceptions, which, as drawn up, and signed by the Counsel on both Sides, the Judge refused to seal; and thereupon the Jury, by his Directions, found a general Verdict for the Plaintiff.

And now, upon an Affidavit made of this Matter, the Court was moved, that all the Proceedings might be set aside, and that the Plaintiff (if he thought fit) might bring a new Ejectment, or at least, that the Court would stay all farther Proceedings in the Cause, till the Bill of Exceptions was signed by the Judge.

Econtra. It was insisted for the Plaintiff, that the Judgment was signed, and the Record removed by the Defendant, who had brought a Writ of Error in the Exchequer-Chamber, so that the Court could not make any Rule in this Cause, and that the Defendant made this Motion for no other Purpose, than that the Court would allow him Time to assign Errors, because the Judge had refused to sign the Bill of Exceptions; but since the Plaintiff had a Verdict and Judgment, and the Defendant was in Possession, it was proposed that he should deliver up the Possession to the Plaintiff; and then, if the Defendant thought himself wronged, he might be Plaintiff in a new Ejectment to recover the Possession again.

It was objected against this Proposal, that if the now Defendant should deliver up the Possession, and be made Plaintiff in a new Ejectment, there were several old Terms still subsisting which might stand in his Way, and that the Writ of Error in the Exchequer-Chamber was not yet returned, so that this Cause was still under the Control of this Court.

Curia. The Court was of Opinion to grant a new Trial, if the Defendant had made this Motion in Time, (viz.) Before

the Judgment was ſigned, but not after, and much leſs after a Writ of Error brought in the Exchequer-Chamber.

And as to the Staying the Proceedings till the Judge who tried the Cauſe ſhould ſign a Bill of Exception, that may be for ever, becauſe he may never ſign them; for it hath been reſolved in this Court, in my Lord Chief Juſtice Holt's Time, that a Judge is not obliged to ſign a Bill of Exceptions, unleſs offered at the Trial, and drawn up according to the Minutes then taken.

The Defendant's Counſel perceiving the Opinion of the Court, offered to deliver up the Poſſeſſion to the Plaintiff, ſo as he would enter into a Rule of Court not to ſet up any old Terms for Years, or Incumbrances againſt the Defendant's Title, and that he would receive a Declaration in Ejectment immediately, and plead to Iſſue, ſo as a Trial might be made at the next Aſſizes; and if a Verdict ſhould be found againſt him, then to quit the Poſſeſſion within ten Days after the Trial; to all which the now Plaintiff agreed.

And at the next Aſſizes this Ejectment was tried, and the Jury found a Verdict for the Defendant, who was Heir at Law, and that to the Satisfaction of the Judge who tried the Cauſe; and in Eaſter-Term following the Plaintiff moved for a new Trial, and to ſet aſide the laſt Verdict, becauſe the Jury found a general Verdict, when it was required that they would find the Matter ſpecially; and accordingly it was ſet aſide.

And in Trinity-Term the Court was moved for a good Jury, and that a ſpecial Verdict might be found, which the Court thought neceſſary to determine the Law in this Matter; and a Rule was made for a good Jury.

Wright *verſus* Horne. *In the Common Pleas.*

THE Caſe, ſi. The Teſtator deviſed all that his Meſſuage in Edmonton to Francis Carter and his Heirs, and all the Reſt and Reſidue of his Meſſuages, Lands, Tenements and Hereditaments in Edmonton, Enfield, and elſewhere, to John Lammas, his Heirs and Aſſigns for ever. See the Caſe of *Goodright* and *Opie antea*.

After the Making this Will, the aforeſaid Francis Carter, the Deviſee, died in the Life-time of the Teſtator, ſo that this became a lapſed Legacy by his Death; and then the ſole Queſtion in Ejectment was, Whether this latter Clauſe of the

the Will would carry over the lapſed Legacy to John Lammas, the Reſiduary Legatee, or whether it ſhould deſcend to the Heir at Law of the Teſtator.

It was admitted, that ſuch a Reſiduary Clauſe would carry over a lapſed Legacy to a Reſiduary Legatee from an Executor; but the Doubt was, Whether it would carry it from the Heir at Law.

* Cro. Car. Spritt *verſus* Bruce. 6 Rep. 16. Collier's *Caſe*. 10 Rep. 35, *in* Mary Portington's *Caſe*.

Thoſe who argued, that it would not, cited many Authorities in the Books, where 'tis expreſly adjudged, that an Heir at Law ſhall not be diſinherited, but by very plain and * clear Words, or by ſome neceſſary Implication from expreſs Words, which ſhew, that the Teſtator did intend to diſinherit him.

† Caſes adjudg. 87.

Now, in Conſtruction of Wills, the Courts of Law always conſider the Intention of the Teſtator, which they collect out of his Words; as for Inſtance; in the Caſe of † Cranmer and Webb, upon the Will of Sir Henry Wood, who deviſed, that if his Daughter married the Duke of, &c. then his Lands ſhould be and remain to her and the Heirs of her Body; but if ſhe died without Iſſue, then, after her Death and the Death of the Duke, that they ſhould be and remain to Sir Cæſar Cranmer, &c. She died without Iſſue, and the Duke ſurvived, and Sir Cæſar and Mr. Webb married her Siſters: Adjudged, that they ſhould take by Moieties during the Duke's Life:

Fitz. Deviſe 22.

So where a Man deviſed his Eſtate to his eldeſt Son, and to Three more and their Heirs, and that one of thoſe Three ſhould have all the Profits during Life; and it being proved, that the Deviſe was only in Truſt for thoſe Three, it was adjudged, that they ſhould releaſe to the Son, who was Heir at Law.

Between Wells *and* Edwards.

So in Chancey's Caſe in February laſt, where the Teſtator, after a Deviſe of ſeveral pecuniary Legacies, added theſe Words, (viz.) And all the reſt of my Goods and Chattels, and Eſtate whatſoever, I deviſe to my Wife, &c. It was decreed, that the Equity of Redemption of a Copyhold of Inheritance (of him the Teſtator) did not paſs by that Clauſe to the Wife, but it ſhould go to the Heir at Law.

Moor 7. Roll. Abr. 844.

And ſo it was where the Teſtator deviſed Lands held of ſuch a Manor to his Wife, for Life, and likewiſe the Services to her for fifteen Years, and all the Manor to T. S. after the Death of the Wife: It was adjudged, that the Heir at Law had a good Title to the Services after the fifteen Years, and during the Life of the Wife.

There is a Case in Leonard, where there seems to be a contrary Resolution against the Heir at Law, but upon Consideration thereof it will appear to be very different from the Principal Case, (viz.) It was a Devise of Lands in Gages, for the Erecting and Maintaining a Free-School, and a Devise of other Lands to T. S. and his Heirs, and all his other Lands to T. French, his Heirs and Assigns for ever; in this Case it was adjudged, that the Devise of the Lands in Gages was void, because there was no Person to take by that Devise, but that it passed to French by those general Words, (viz.) All other his Lands to French, tho' the Intention of the Testator could not be collected out of the Words of this Will, that they should pass to him. 1 Leon. 251. Bennett ver. French.

Besides, this Case stands singly by it self, and there is not another in all the Books to support it; and upon due Consideration had, there is some Difference between that and the Principal Case; for in French's Case, the Devise was void ab initio, but here it was good at the Time of the Making this Will, and the Testator himself, without a prophetick Spirit, could not know but that it would be good at the Time of his Death.

If it should be objected, that these Lands may pass to Lammas by Way of executory Devise, upon the Contingency that Carter might die in the Life-time of the Testator, which he might very well intend, without a prophetick Spirit; the Answer is, that for Estates to pass by executory Devise, is only an Indulgence allowed by the Law, where otherwise the Words of the Will would be void, which is not applicable to the present Case; because there are other Lands mentioned in this Will, sufficient to satisfy the Words.

Neither are these Cases (where it appears on the Face of the Will, that the Testator had Lands to dispose at the Time the Will was made) applicable to this Case, because here the Testator had not these Lands to dispose at the Time of the Making his Will; for the Words, (viz.) All the Rest and Residue of his Lands to John Lammas, are exclusive, and shall only pass those Lands which were not before devised; but the Lands now in Question were before devised to Carter; and he being dead in the Life-time of the Testator, 'tis impossible for him to take by this Devise, therefore they shall descend to the Heir at Law. Allen 28. 2 Vent. 285. 1 Lev. Salk. 239.

It was argued for John Lammas, the Residuary Legatee, that by the Devise of all the Rest and Residue of his Lands to him and his Heirs, those very Lands which were devised to *Econtra* against the Heir.

to Carter, and which by his Death in the Life-time of the Teſtator, became a lapſed Legacy, were legally veſted in the ſaid Lammas; ſo it ſeems plain, that all the Reſt and Reſidue of his Eſtate, which the Teſtator had at the Time of Making his Will, did paſs to him by thoſe Words; and why ſhould not that Eſtate, which by Poſſibility he might have in his Life-time, paſs to the ſaid Lammas by Way of executory Deviſe, upon a Contingency that Carter might die (as he did) in the Life-time of the Teſtator, eſpecially ſince by the Deviſe to Carter, the Heir at Law was diſinherited.

'Tis like that Caſe, where the Teſtator deviſed his Lands to Two and their Heirs, and one of them afterwards died, living the ſaid Teſtator, the other ſhall have the Whole, tho' by the Words of the Will the Teſtator intended him only a Moiety, but he ſhall have the other Moiety before the Heir at Law, becauſe 'tis very plain the Teſtator intended to paſs all his Eſtate from him.

So where the Deviſe was to T. S. and his Heirs, and if he died without Iſſue, then to M. H. in Fee, and afterwards T. S. died in the Life-time of the Teſtator, but left Iſſue: Adjudged, this was a lapſed Legacy as to T. S. and that the Lands ſhould paſs to M. H. and not to the Iſſue of T. S. becauſe ſuch Iſſue could not take by this Deviſe.

Cro. Eliz. 423.

Now in the Principal Caſe, the Teſtator intended, that Lammas ſhould take what he had not before deviſed to Carter; and his Intention is clear without any Spirit of Prophecy, that if Carter had lived, the Heir at Law had been effectually diſinherited, therefore theſe general Words, (viz.) All the Reſt and Reſidue of my Lands to Lammas, being ſufficient to paſs them to him, and agreeable to the Intention of the Teſtator himſelf, they muſt neceſſarily paſs to him.

As to that Caſe between Wells and Edwards, 'tis no Authority againſt that Conſtruction which hath been made in the Principal Caſe, becauſe in that Caſe the Will began with pecuniary Legacies, which ſhews, that the Teſtator did not intend to paſs the Equity of Redemption of a Mortgage of a Copyhold of Inheritance to his Wife, and for that Reaſon it went to the Heir at Law.

Curia. The Court were of different Opinions, there being no Caſe in all the Books which comes near it, except that in Leonard's Reports, which ought to be well conſidered; but the Chief Juſtice was of Opinion for the Heir at Law againſt the Reſiduary Legatee; becauſe theſe Words, (viz.)

All the Reſt and Reſidue of my Lands to John Lammas, were excluſive of the Lands deviſed to Carter; ſo that by his Death in the Life-time of the Teſtator, the Legacy to him being lapſed, thoſe Lands muſt deſcend to the Heir at Law.

Another Judge was of a contrary Opinion, (viz.) That it ſeemed very clear to him, that the Teſtator intended to diſinherit the Heir; to which Opinion the Chief Juſtice likewiſe agreed as to the Lands deviſed to Carter; but that it doth not follow, that becauſe he had diſinherited him of the Lands in Relation to Carter, therefore he intended to diſinherit him of thoſe Lands which he had deviſed to Lammas; ſo that this Matter is fit to be conſidered; and ſo it was adjourned.

Anonymus.

AN Execution was taken out againſt the Teſtator, in his Life-time, and executed after his Deceaſe; the Writ was returnable Octab. Martini, and executed on the 16th Day of November, which was two Days before the Return was out:

It was objected, that this Execution was ill, being executed after the Teſtator's Death, and without any Scire facias brought, to ſhew Cauſe quare executionem non habet.

The Execution being ſued out before the Teſtator's Death may be executed afterwards without a Scire facias, as was reſolved in Dr. Needham's Caſe; and it may be executed at any Time before the Return of the Writ, nay, on the very Day that 'tis returnable, and good; and if 'tis executed in the Vacation, it ſhall refer to the antecedent Term, and ſo it ſhall, if 'tis executed in Term-time; ſo is Cro. Eliz. 181. Parker *verſus* Moſſe. Curia. 2 Vent. 218.

Crundell *verſus* Bodily.

IN Ejectment the Defendant had a Verdict and Judgment, and Coſts taxed, and then the Plaintiff brought a Writ of Error in the Exchequer-Chamber, and pending that Writ he brought a new Ejectment; and now it was moved, that he might not proceed on this Ejectment till he had paid the Coſts of the Firſt. Salk. 259.

Econtra. It was inſiſted for the Plaintiff, that he did not bring this Writ of Error to avoid the Payment of the Coſts, neither was the Verdict and Judgment againſt him in the firſt Ejectment any Bar to his bringing another Ejectment; 'tis true, it may be Evidence againſt him, but 'tis no Bar, therefore this Motion comes too ſoon, and ought to be ſuſpended till the Errors aſſigned are determined in the Exchequer-Chamber, and the Judgment either affirmed or reverſed.

The Court thought it hard that the Defendant ſhould be doubly vexed by the Proceedings on the Writ of Error, and by a new Ejectment; therefore made a Rule, if the Plaintiff ſhould proceed on the Ejectment, he ſhall pay the Coſts of the Firſt, otherwiſe he ſhall not proceed on the Second.

The King *verſus* Colvin.

UPON a Motion for an Attachment againſt the Defendant, who is a Gaoler, for denying to return an Habeas Corpus directed to him, and for extorting a Note from the Proſecutor, then in his (the Gaoler's) Cuſtody, ſo as by Menaces and Dureſs he was forced to comply, and give the Note for Payment of Money to the Gaoler.

The Court made a Rule, that he ſhould ſhew Cauſe why an Attachment ſhould not go.

Nota; An Attachment iſſued out againſt an Aſſociate for mending a Record after a Motion in Arreſt of Judgment for the ſame Fault, which he mended; but upon his Making the Record as it was before, it was mended, and paying Coſts, the Court, ex gratia, ſuperſeded the Attachment.

A Motion was made to ſet aſide two Verdicts, becauſe the Diſtringas's were not ſtamped, ſo that the Trials were void by the Stamp-Act; but the Solicitor having got thoſe Writs ſtamped before the Poſtea was brought into Court, this Motion was rejected, for it did not appear to them but that they were ſtamped; and they could not take any Notice, Whether they were ſtamped, or not, at the Aſſizes; if they were not, the Defendant ſhould have taken Notice, and inſiſted on it at that Time.

Nota; It was held by the Court, that 'tis not ſufficient to deliver a Copy of a Declaration to the Turnkey or Gaoler

where the Defendant is in Cuſtody, unleſs the Declaration is firſt filed in the Office; and therefore where a Judgment was had upon a Declaration ſo delivered, it was ſet aſide by the Court.

And if Judgment is regularly obtained againſt ſuch Defendant, the Plaintiff muſt charge him in Execution within two Terms afterwards, and not after thoſe two Terms are expired, or if he is charged afterwards, the Court will diſcharge him with Coſts.

The King *verſus* Pepper.

A Rule of this Court was made, anno 15 Car. 2. that the Plaintiff ſhould ſet forth in his Writ or Bill an Ac etiam of the Sum for which he expected the Defendant ſhould give Bail; and that if he brought an Action without any Cauſe, on Purpoſe to hold the Defendant to ſpecial Bail, he ſhould be puniſhed.

And now the Court was moved for an Attachment againſt Pepper, who brought an Action, with an Ac etiam Billæ in a great Sum, to hold the Defendant to ſpecial Bail, where nothing was due, as it appeared before a Judge, the Plaintiff being ſummoned before him to ſhew his Cauſe of Action; and this was ſaid to be an Abuſe of the Proceſs of this Court, and conſequently a Contempt.

The Court held this was not ſuch a Contempt as to iſ- Curia.
ſue out or grant an Attachment againſt the Plaintiff, but directed, that if the Defendant was damnified, he might bring his Action.

Andrews *verſus* Harper.

IN C. B. there is but one Scire facias againſt the Bail, and upon a Nihil returned there is Execution, but in B. R. the Courſe is to have two Scire facias's againſt the Bail, (viz.) A Sci. fa. and an Alias Sci. fa. but both muſt not be ſued out together, as formerly; for the firſt ſhall be duly returned before the Alias Sci. fa. is ſued out, which muſt bear Teſte on the Day of the Return of the Firſt; and there muſt be fifteen Days inclusive, between the Teſte of the Firſt and the Return of the Alias; now, in the principal Caſe, the Court was moved to ſet aſide a Judgment obtained againſt the Bail

upon two Scire facias's brought against them, because it did not appear that the Judgment was had on the Return of two Nihils; and it was referred to the Master to examine this Matter.

Wadsworth *versus* Handyside.

12 Will. 3. cap. 3. How to proceed against privileged Persons.

By the Statute 12 Will. 3. 'tis enacted, that Actions may be brought in any of the Courts in Westminster, against any Person entitled to Privilege of Parliament, immediately after the Dissolution or Prorogation, until a new Parliament, or the same is re-assumed, and immediately after an Adjournment of both Houses, for above fourteen Days, until re-assumed; and that Persons having Cause of Action against any Member of the House of Commons, may have Process against him during the Time aforesaid, out of the said Courts, by Summons, by Distress infinite, or by original Bill, Summons, Attachment, and Distress infinite, till the Defendant shall appear and file common Bail, &c.

Now this being a Proceeding in a special Manner directed by this Statute against privileged Persons, the usual Practice is, when an Action is brought against such privileged Person, to file a Bill in Nature of a special Capias against the Defendant, and then to summons him; and if he appears upon such Summons, then the Plaintiff may declare against him as in Custodia Mareschalli; to which Declaration he ought to answer without any Imparlance; and in the principal Case, the Defendant having appeared upon the Summons, and filed common Bail, it was now moved, that he might have no Imparlance over to the next Term.

Econtra. 'Tis admitted, that this Suit was against a Member of Parliament, and that if he was not a privileged Person, he might have an Imparlance of Course to the next Term, since the Declaration against him was not delivered before Cro. Animarum.

That if a special Original is brought against a Person who hath no Privilege, he must likewise have an Imparlance of Course; and it would be a very proper Method to leave those who had no Privilege, and those who were privileged, upon the same Footing.

As to the Act of Parliament mentioned on the other Side, it hath no Manner of Influence on the Practice of the Court; it only appoints a Method to bring privileged Persons to appear.

But admitting that the Plaintiff might proceed in this Case, as by special Original, yet that would not be a Reason against Granting an Imparlance, because the Summons is still general, and so is the Capias; and 'tis not the special Original, but the special Capias which hastens the Proceedings; and it would be very hard to take this as a Case, where a special Capias is allowed to be the first Summons; therefore it was insisted for the Defendant, that he might have Leave to impark.

The Court was of Opinion, that the Proceedings in this Case should be like those in most other Cases, and not to be influenced by the State of either Party; and that if they are founded on a special Original, then there lies an Imparlance of Course till the next Term. Curia.

Long *versus* Nixon.

THIS was an Action brought in London, and the Defendant moved the Court to change the Venue; and a Rule was made that it should be changed.

And now the Plaintiff moved to discharge that Rule, and it was insisted in his Behalf, that this was a transitory Action, which the Plaintiff might bring where he pleased; and that it was by the Indulgence of the Court, and for the Ease of the Parties, that Venues are at any Time changed, and that it would be very inconvenient for the Plaintiff if this Venue should be changed, because the Action being brought by special original, there would be a Variance upon changing the Venue, therefore 'tis convenient for the Plaintiff, that the Action should be tried in London.

It was said for the Defendant, that tho' it might be convenient for the Plaintiff, yet it might be otherwise for the Defendant to have this Trial in London, and that there could be no Inconvenience to the Plaintiff, tho' the Action was brought by special Original, for such Actions are frequently brought in the Court of Common Pleas, and there the Venues are daily changed. Econtra.

The Court would not discharge the Rule for the Changing the Venue, for if they should, then where an Action is laid in London, the Venue would never be changed; and as to the Variance, the Defendant shall take no Advantage of it, tho' the Action was brought by special Original. Curia.

DE

DE
Term. Paſchæ,
Anno 10 Georgii, 1725.

Knight *verſus* Cambridge.

Action upon a Policy of Inſurance.

WRIT of Error to reverſe a Judgment given for the Plaintiff in the Common Pleas in an Action brought on a Policy of Inſurance againſt the Perils of the Sea, Winds, Pirates, and * Barratry of the Maſter; and the Jury found, that the Ship was loſt per fraudem & negligentiam Magiſtri.

* (*i. e.*) Deceipt.

For the Defendant.

The Queſtion was, If the Ship thus loſt was within the Words of this Policy of Inſurance; and it was inſiſted for the Defendant, that it was not; for this Verdict will not warrant this Judgment, becauſe Fraud is not within the general Words of this Inſurance, which, like other Covenants, muſt have a reaſonable Conſtruction; for if a Man ſells Lands, with a Covenant in the Purchaſe-Deed, for quiet Enjoyment, without any Diſturbance, &c. certainly thoſe Words muſt be intended to be againſt a † lawful Diſturbance.

† Vaugh. 122.

So that the ſingle Point is, Whether this Breach is well aſſigned, and found in this Record, and that depends on this Queſtion, (viz.) Whether fraus & negligentia in the Maſter, is a Barratry, or not; now 'tis plain, that negligentia is no Barratry, becauſe Barratry is a Fraud which doth not include a Neglect; and the Merchant hath his Remedy againſt the Maſter for any Neglect; ſo that admitting there was a Neglect in the Maſter; yet if 'tis not within the Policy,

the Inſurers cannot be charged; and for theſe Reaſons the Judgment ought to be reverſed.

On the other Side it was ſaid, that this Policy of Inſurance was drawn in as general Words as could be invented; and 'tis very true, it muſt be expounded as other Covenants, and like the Covenant for quiet Enjoyment, tho' in general Words it extends only to a legal Diſturbance, and for very good Reaſon, that being the Diſturbance which is only intended: Econtra.

But 'tis otherwiſe in Policies of Inſurance which were invented to encourage Trade, and that Merchants might venture more freely, becauſe if any Loſs ſhould happen, they might bear it with more Eaſe.

Now Barratry, in its Nature, is any Kind of Cheating, and the Verdict finds this Ship was loſt per fraudem & negligentiam of the Maſter; and 'tis generally known, that Ships are never wilfully ſunk, but after ſome Barratry committed, for then they are deſtroyed to conceal the Villany, ſo that fraus & negligentia is a plain Barratry within the Words of this Policy.

Therefore ſince Inſurances began and are upheld to encourage Merchants to Trade, and that the Words of this Policy are ſufficient to charge the Inſurers, and there is no Default in the Merchant; 'tis unreaſonable that the wilful Default of the Maſter ſhould avoid this Inſurance; therefore the Judgment ſhould be affirmed.

The Court held, that every Neglect of the Maſter is not within this Policy; and if he run away with the Ship or imbezil the Goods, the Merchant may have an Action againſt him, but yet he may provide againſt it in another Manner, (viz.) By inſuring his Ship and Goods to ſecure himſelf againſt ſuch Acts of Barratry; for 'tis reaſonable that Merchants who venture a large Share of their Stocks ſhould ſecure themſelves in what Manner they think proper againſt the Barratry of the Maſter, and all other Frauds; and this muſt be intended a Fraud in the Maſter, and not a bare Neglect, ſo that this Breach is well aſſigned, it being a general Rule, that it may be aſſigned in as general Words as the Covenant is; and if it had been aſſigned per Baracterium Magiſtri, it had been good, but 'tis not neceſſary to aſſign it in the very Words of the Covenant, for 'tis ſufficient if 'tis aſſigned in the Senſe; and they all agreed, that Fraud is Barratry, tho' Negligence might not; ſo the Judgment was affirmed. Curia.

Wilkinſon

Wilkinſon *verſus* Meyer.

Covenant to transfer Stock.

AN Action of Covenant was brought upon an Indenture, wherein the Plaintiff covenanted to transfer, and the Defendant to accept a Transfer of ſo much South-Sea Stock at ſuch a Time, and to pay ſo much Money for the Transfer; and now this Action was brought for the Money.

The Defendant pleaded, that the Contract was not regiſtered according to the Statute 7 Geo. by which 'tis enacted, That every Contract for the Sale or Purchaſe of Subſcriptions or Stock of the *South-Sea* Company, *&c.* ſhall be entered in Books to be kept for that Purpoſe by the Company, to whoſe Capital ſuch Stock or Subſcription did belong, and in Default of ſuch Entry, every ſuch Contract ſhall be void; and ſuch Entries ſhall expreſs the Names of the Parties for whoſe Uſe ſuch Contracts were made, *&c.*

7 Geo. Seſſ. 2. cap. 1. §. 8.

Now the Plaintiff in Regiſtring this Contract did not expreſs the Names of the Parties for whoſe Uſe it was made, but that it was for his own Uſe; and it was argued in his Behalf, that this was a good Regiſtring the Contract within the Act, which was made on Purpoſe to prevent doubtful Suits, on Account of ſo many Perſons being made Truſtees; and tho' it may be objected, that this Regiſtring only ſhews who hath the Benefit of the Contract then made; yet it was the Intent of the Legiſlature, that Contracts to be made at any Time after ſhould be regiſtered, on Purpoſe to ſhew who they were that had a Right to the Stock; and this is ſufficiently ſhewed by Regiſtring it as before-mentioned.

'Tis true, the Act mentions, that the Entries of Contracts, &c. ſhall expreſs the Names of the Parties for whoſe Uſe ſuch Contracts were made, which Words relate to Contracts already made; but certainly it was intended, that Contracts hereafter to be made, ſhould be regiſtered as well as thoſe already made, like the Word Procreatis in a common Settlement, which, in a ſtrict Senſe relates only to Iſſues already had, yet it hath been adjudged to relate to Iſſues to be begotten.

Econtra.

The Words of the Act being plain, That the Entries, *&c.* ſhall expreſs the Names of the Parties for whoſe Uſe the Contracts were made, ſuch an Entry as in the principal Caſe will not be good, for 'tis not within the Statute, that being made to quiet the Minds of the People, and for that Reaſon ſhould

have a favourable Conſtruction; but the Intent of the Statute is not anſwered by this Sort of Regiſtring; for the Entry that it was for the Plaintiff's own Uſe, may be in Truſt for a Director of the Company at the Time of Making the Contract, tho' it may be for his own Uſe at the Time of Making the Entry; and the Act plainly imports, that the Entry ſhould ſhew for whoſe Uſe it was at the Time of Making the Contract; for if it was to the Uſe of any of the Directors, who by Fraud had raiſed the Value of the South-Sea Stock, it would be void, and an Action would lie againſt him for ſo much Money received to the Uſe of him who paid it.

Now this Statute being made to diſcover the Eſtates of thoſe who had cheated the People, and to quiet their Minds, and to prevent the Frauds of the Directors, that they might not for the Time to come have any Benefit of ſuch Contract; it ought to have as liberal a Conſtruction as the Legiſlature intended, therefore the Entry ſhould ſhew for whoſe Uſe this Contract was made.

To which it was anſwered and admitted, that this Statute ought to be carried as far as poſſible, to obviate the Frauds of the Directors; but there could be no Fear in this Caſe, that any of them could be concerned, becauſe this was a Contract for Lottery Annuities, which the Directors always ſubſcribed in their own Names, but not the Money. Subſcriptions. Econtra.

The Queſtions are, Whether this Entry hath complied with the Words of the Act? If not, then, Whether the Meaning of the Act was ſatisfied or not? And by three Judges againſt the Chief Juſtice, this was held to be a good Contract, and well entred in the South-Sea Books; for the whole Agreement was regiſtred, and by Conſequence it muſt be ſhew'd who had a Right to demand the Money. The Intent of the Legiſlature was only to ſhew, that there was a good and a ſolemn Contract, ſo that the People might not be troubled with every trifling Bargain made at that Time, but only upon legal Contracts, which were to be regiſtred; and what was done by the Plaintiff, ſhews, that this Contract was for his Benefit; it ſhews, that he is the Perſon who had the Right; and 'tis a foreign Suppoſition to ſuppoſe a Truſt for a Director only, becauſe 'tis poſſible there may be ſuch a Truſt. Curia.

But Judgment being given for the Plaintiff, a Writ of Error was brought in the Exchequer-Chamber by the Defendant; and in Trinity-Term following, it was moved to a- Motion to amend a Record.

mend the Venire facias; for this being an Action of Covenant, and the Defendant having pleaded ſeveral Pleas, and the Plaintiff having replied to one, and demurred to the Reſt, the Venire facias was drawn in the uſual Form, (viz.) Tam ad triandum exitum quam ad inquirendum de damnis, theſe laſt Words, (viz.) Ad inquirendum de damnis ought to be ſtruck out.

To which it was anſwered, that if the Court ſhould give Leave to amend this Record after a Writ of Error brought, it is but reaſonable that the Plaintiff in the original Action ſhould pay Coſts; for 'tis probable, that the Writ of Error was brought by the Defendant for this very Fault.

Thereupon the Counſel for the Defendant in Error offered to pay Coſts, ſo as the Plaintiff would waive his Writ of Error, for then it will appear, that it was brought for this very Fault; but if he would not waive it, then it muſt be brought for Delay; but he refuſing to waive it, the Defendant had Leave to amend without paying Coſts.

Webſter *verſus* Gearing.

To quaſh the Proceedings againſt the Bail.

A Motion was made to quaſh the Proceedings againſt the Bail, the Plaintiff having declared for more than was contained under the Ac etiam in the Bill:

Curia.

One Judge replied, that in the Caſe of Wiatt *verſus* Evans, anno 1694, it was adjudged to be a Diſcharge of the Bail; and another Judge ſaid, that in the Common Pleas it was held good pro tanto; but that there being two Cauſes of this Kind now depending, the Proceedings were ſtayed in this Cauſe till the Point was reſolved in the other.

The King *verſus* Pindar.

Information in Nature of a *Quo Warranto* for Uſurping the Office of Mayor.

UPON an Information in the Nature of a Quo Warranto againſt the Defendant, for Uſurping the Office of Mayor of the Corporation of Penryn in Cornwal; the Defendant pleaded, that he was debite electus, and ſworn into the ſaid Office, &c. The Plaintiff replied, that he was not electus, and ſworn modo & forma, &c. as he had pleaded, and thereupon they were at Iſſue, and the Jury found that he was debite electus, but that he was not duly ſworn into the Office, &c. And upon a Motion to ſet aſide this

Verdict, it was inſiſted, that he was not Mayor till duly ſworn, and therefore he had uſurped the Office, and Judgment of Ouſter ought to be given and entered againſt him.

But on the other Side it was ſaid, that the Election being found to be regular, the Defendant was intitled to a Mandamus to be ſworn; but if there is a general Judgment of Ouſter againſt him, in ſuch Caſe he cannot have a Mandamus to be ſworn by Virtue of any precedent Election; therefore it would be prejudicial that ſuch Judgment ſhould be entered againſt him; and there being Precedents in what Manner it ſhould be entered, the Court was moved to give ſome Directions therein, ſo as the Entry of the Judgment might not hinder the Defendant from obtaining a Mandamus. Econtra.

But the Court gave Judgment of Ouſter, and ſaid, if the Defendant was duly elected, let him be ſworn as he can; thereupon he moved for a Mandamus, and it was granted. Curia.

The Pariſhioners of Buckington *verſus The Pariſhioners of* Sevington.

UPON a Motion to quaſh an Order of Seſſions, the Caſe was thus:

ſi. An Apprentice was bound by Indenture, &c. to his Maſter, who within two Years afterwards broke, and then the Apprentice, by and with the Leave of his Maſter, was hired in another Pariſh for a Year, and ſerved for a whole Year there; which Service commencing and ending after his Maſter failed; two Juſtices were of Opinion, that it gained a Settlement, and therefore made an Order to remove this Apprentice from the Pariſh where his Maſter lived, and where he was bound Apprentice, to the Pariſh where he was hired; which Order was quaſhed upon an Appeal to the Seſſions, and the Man was ſent back to the Pariſh where he was an Apprentice. Apprentice hired into a Service after his Maſter broke.

And it was inſiſted, that a Hiring de facto ſhould gain a Settlement for a Man as well as a Marriage de facto would gain Dower for a Woman.

To which it was anſwered, that this Hiring could not gain any Settlement, becauſe the Indenture of Apprenticeſhip was ſtill ſubſiſting, and could not be diſcharged but by ſome other Deed, or by the Seſſions, ſo that this was not a lawful Hiring; and if ſo, then a Service for a Year in Purſuance of ſuch an illegal Hiring, cannot gain a Settlement. Econtra.

Curia. It was admitted by the Court, that where one is bound Apprentice by Indenture, it cannot be diſcharged, but by Deed, or by the Seſſions; and that a Hiring after he is bound, or any Conſequences ariſing upon ſuch Hiring, are entirely void whilſt the Indenture ſubſiſts, and until 'tis deſeaſanced; for when an Apprentice ſerves forty Days by Virtue of the Indenture, he cannot gain another Settlement, tho' his Maſter conſents, becauſe he had a Settlement by the Service under the Indenture; ſo there is no Colour to ſet aſide the Seſſions Order.

Anonymus.

To ſtay Proceedings on a Judgment, for that Part of the Money was paid.

A Motion was made to ſtop the Proceedings on a Judgment, ſuggeſting, that Part of the Money was paid, and that the Defendant was willing to pay the reſt into Court.

To which it was replied, that what Money the Plaintiff had already received, was in Diſcharge of ſome other Debts between him and the Defendant; but upon producing his Receipt, it appeared to be paid indefinitely, (viz.) As ſo much due upon Account.

Curia. Where a Debtor owes Money to his Creditor upon ſeveral Accounts, he may pay Part, and apply it to any Debt; but if the Creditor denies that he received it in Satisfaction of that Debt, but upon ſome other Account, then he hath Election to apply the Payment to what Debt he will; ſo where it appears that Money is paid indefinitely, the Creditor hath Election to declare on what Account he received it.

Therefore if the Debtor in the principal Caſe would have this Payment applied to the Judgment, upon equitable Terms, he ſhould likewiſe pay or tender all the Money due to the Plaintiff on ſimple Contract, or otherwiſe, as far as the Penalty of the Judgment covers ſuch Debts; for this Court will not compel a Creditor by Judgment to accept a leſs Sum than is due on the Judgment, upon the Account of any former indefinite Payments, when there were other Accounts depending between the Parties, unleſs the Defendant will conſent to bring in all that is due to the Plaintiff.

Martin *verſus* Henriques.

UPON a Scire facias on a Judgment againſt the Principal, he pleaded Nul tiel Record; whereupon the Plaintiff produced the Record, and the Maſter ſigned the Roll quod querens protulit Recordum, and the Plaintiff ſigned Judgment the very next Day, and took out Execution, which upon a Motion was ſet aſide as irregular, becauſe he ought not to have ſigned the Judgment till four Days after the Record was brought in. Judgment ſet aſide, becauſe ſigned within four Days, &c.

Chriſty *verſus Manucaptors of* Anſtruther.

UPON a Writ of Error brought in the Exchequer-Chamber on a Judgment given in B. R. the now Defendants entered into a Recognizance purſuant to the * Statute, that the Plaintiff in Error ſhould proſecute his Writ with Effect; and if the Judgment ſhould be affirmed, then to pay the Debts, Damages, and Coſts. Bail on a Recognizance of Bail. * 3 Jac. c. 8.

Afterwards the Judgment was affirmed, and then the Plaintiff brought an Action of Debt upon this Recognizance againſt the Bail; and the Queſtion was, Whether they ſhould be diſcharged upon common Bail; and it was ſaid by their Counſel, that they ought to be diſcharged, for 'tis againſt the Practice of the Court, that Bail ſhould be required of Bail.

It was never yet determined, that ſpecial Bail is not requirable in an Action of Debt on a Recognizance of Bail; but the Reaſon of the Caſe ſeems to require it, becauſe the Recognizance is directly for Payment of Money, (viz.) To pay the Debt if the Judgment ſhould be affirmed; and certainly it was never yet denied, that where an Action of Debt is brought on a Bond for Payment of Money, but that ſpecial Bail is always required; and the Reaſon is the ſame for ſpecial Bail in an Action of Debt upon a Recognizance againſt the Bail, for ſuch Recognizance is a Security for the Payment of the Condemnation-Money, and a collateral Undertaking, that it ſhall be paid upon the Affirmance of the Judgment; and the Bail upon the Recognizance cannot be diſcharged, but upon Payment of the Money, for they cannot render the Principal, becauſe ſuch Render doth not lie by the Bail Econtra.

Bail upon a Writ of Error; and ſo it was held by two Judges, the Court being not full.

Shipton *verſus* Hopton.

Debt for Keeping an Engine to deſtroy the Game.

THIS was an Action *** of Debt, qui tam, &c. brought by a common Informer, on the Statute 5 Annæ, cap. 14. for 15 l. wherein the Plaintiff declared on two ſeveral Counts, one for 10 l. for killing two Partridges, the other for 5 l. for Keeping an Engine to deſtroy the Game, not being qualified, &c. Virtute ſtatutorum hujus Regni; upon Nil debet pleaded, the Plaintiff had a Verdict for 5 l. only; and it was now moved, that he might enter the Verdict on either of the Counts, becauſe the Defendant intended to move in Arreſt of Judgment; for tho' he might not be qualified by the Statutes of this Land to keep a Gun, yet if he is otherwiſe qualified by Law, he is not ſubject to this Penalty.

Now he may be qualified by Law, as being Huntſman to a Nobleman, who, in coming up to the Parliament, may kill a Deer in any of the King's Foreſts; and this he may do by the Foreſt-Law, which is Part of the Law of this Realm; and for this Reaſon the Plaintiff was ordered to enter his Judgment.

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† 8 Geo. cap. 19.

*** This Action is given by the Statute † 8 *Georgii*, by which 'tis enacted, that where an Offence ſhall be committed againſt any Law for preſerving the Game, and the Offender liable to pay a pecuniary Penalty, upon a Conviction before a Juſtice, the Perſon may ſue for it by an Action of Debt.

Burges *verſus* Bradſhaw.

The Agreement was in the Copulative, and the Breach was aſſigned in the Disjunctive.

THE Caſe, ſ. By Articles made between the Plaintiff and the Defendant for a Horſe-Match, it was agreed, that the Plaintiff ſhould ride without Whip or Stick, or other Weapons, except Boots and Spurs; and in an Action brought on theſe Articles, the Plaintiff ſet forth in his Declaration, that he mounted the Horſe ſine flagello & Baculo vel aliis armis, and did ride in forma prædicta; the Plaintiff had a Verdict; and now it was moved in Arreſt of Judgment, that this Declaration was not purſuant to the Articles of Agreement, for that was to ride without Whip or Stick, or

other Weapons, in the Disjunctive, and the Declaration is sine flagello & baculo in the Conjunctive.

And this Case was compared to some Cases which were adjudged upon Wagers in the late Wars, (viz.) That the English would beat the French without the Help of the Germans or Dutch; and in an Action brought for the Money won, the Plaintiff laid in his Declaration, that the English did beat the French without the Help of the Germans and the Dutch; and this was held ill.

It was objected on the other Side, that there is a Case in * Cro. Eliz. where the Defendant was by Agreement to pay so much Money when such a Ship arrived in such a Port; and the Declaration was, that the Ship arrived ad Portum, instead of in Portu; and this was moved in Arrest of Judgment, but not allowed, which is very true, because the Preposition Ad signifies At or In. * Cro. Eliz. 229.

'Tis true likewise, that Deeds (as it was said on the other Side) ought to be favourably construed; and the Reason is, because they are made by the Consent of the Parties; but it doth not follow from thence, that Declarations ought to have a favourable Construction; for the Reason is not the same, because they charge the Defendant in an adversary Manner.

Besides, the Riding without Whip and Stick alters the whole Sense of the Articles, for he may ride without both, but still he may ride with one of them; therefore the Plaintiff should have laid in his Declaration, that he rid without either.

To which it was answered, that it was necessary at the Trial to prove, that he did ride without either, for otherwise the Plaintiff could never have a Verdict; therefore it must be intended, that this was proved at the Trial; and there are several Cases to warrant such Intendments; to Instance in one: Econtra.

ff. Indebitatus Assumpsit was brought for Money received upon Account; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that this Action would not lie, but an Action of Account; for if a Man receives Money to account, 'tis not to be demanded as a Duty from him till he hath neglected or refused to account; and this must be set forth in the Declaration; but it was adjudged, that the Declaration was helped by the Verdict, and that it shall be intended he refused to account, or had done something to make him an absolute Debtor. Poulter *ver.* Cornwall. Salk. 9.

If

Curia. If the Terms of the Agreement had not been proved at the Trial, the Plaintiff could not have a Verdict; ſo it muſt be intended that the Agreement was ſufficiently proved; and there are ſeveral Caſes wherein it hath been adjudged, that where Words may be taken in a double Senſe, the Court, after a Verdict, will always conſtrue them in that Senſe which may ſupport the Verdict; now here the Jury found, that the Plaintiff did ride ſine flagello & baculo vel aliis Armis, in which the Diſjunctive Vel in the latter Part of the Sentence, qualifies the Conjunctive Et, and diſjoins that Copulative; ſo that it ſhall be taken in a diſjunctive Senſe; ſo Judgment was given for the Plaintiff.

Eaſt-India *Company verſus* Ellis.

Writ of Inquiry executed before the Chief Juſtice. AFTER a Judgment by Default for the Plaintiff, and a Writ of Inquiry brought, it was moved, that it might be executed before the Chief Juſtice, at the Sittings at Guild-hall in London, the Action being brought for 2000 l. and a Rule was made accordingly.

Hutchiſon *verſus* Smith.

The Plaintiff died before the Return. THE Caſe, ff. One T. S. was arreſted at the Suit of the Plaintiff Hutchiſon, and Smith the Defendant became Bail to the Sheriff for the Appearance of the ſaid T. S. at the Return of the Writ; but before any farther Proceedings, Hutchiſon died; yet his Attorney took an Aſſignment of the Bail-Bond, and proceeded to Judgment and Execution againſt the Bail; and now the Court was moved to ſet aſide theſe Proceedings as irregular; and the Matter being ſo reported by the Maſter, they were ſet aſide.

The King *verſus* Dunbarr.

Attachment againſt Perſons reſcuing a Priſoner who was taken upon an Eſcape-warrant. UPON the Maſter's Report, the Caſe appeared to be as followeth:

ff. The Defendant Dunbarr was a Priſoner in the King's Bench, and charged in Execution there at the Suit of one Pilkington, and afterwards was turned over to the Fleet, and there likewiſe charged in Execution at the Suit of the

ſame Party; and on the 30th Day of January laſt was taken in Leiceſter Fields upon an Eſcape-Warrant ſigned by one of the Judges of B. R. and then he inſiſted on a Day Rule, but upon Search there was none for that Day; thereupon, as he was carried thro' the Old Baily towards Newgate, the Officers of the Fleet reſcued him.

And now upon a Motion for an Attachment againſt them, and that Dunbarr might be taken out of the Fleet and ſent to Newgate; it was inſiſted for him, that he being charged in Execution in the Fleet, could not be taken by an Eſcape-Warrant iſſuing out of the Court of King's Bench.

Beſides, he thought he had a good Day-Rule, for his Name was entered in the Petition for Day-Rules on the 30th Day of January, but the Clerk did not come in Time to have it read in Court that Day.

As to the Objection, that this Man being charged in Execution in the Fleet (which is the Priſon of the Court of Common Pleas) cannot be taken by an Eſcape-Warrant ſigned by any of the Judges of the Court of King's Bench; it appears to be otherwiſe upon Reading the * Statute, by which 'tis enacted, That if any Perſon charged in Cuſtody in the *King's Bench* or *Fleet*, in Execution, or on mean Proceſs, *&c.* ſhall go at large, upon Oath made thereof in Writing before the Judge of the Court where the Commitment, Action, Judgment, or Execution was, ſuch Judge ſhall commit the Perſon eſcaped to the common Gaol of the County where retaken, there to remain without Bail till diſcharged by Law. Curia. * 1 Annæ, cap. 6.

So that any Judge of the Court where the Action was brought may grant an Eſcape-Warrant; and a Judge of the Common Pleas may grant it, though the Priſoner is turned over and charged in Execution in the King's Bench, and ſo vice verſa.

As to the Entry of his Name in the Petition for a Day-Rule it ſignifies little, unleſs 'tis read in Court; therefore an Attachment was granted againſt thoſe who reſcued Dunbarr, and a Rule was made, that he ſhould be taken out of the Fleet and ſent to Newgate.

Cloud *verſus* Nicholſon.

Two were bound in a Bond, and the Action was brought againſt one.

THE Caſe, ſt. Two were jointly bound in a Bond; and in an Action brought againſt one alone, the Plaintiff had a Verdict; and it was now moved in Arreſt of Judgment, that tho' this might have been pleaded in Abatement of the Action, yet ſince it appears upon the Face of the Record in which the Bond was entered, that the Plaintiff had no Right againſt one alone, he cannot have Judgment.

Curia.

The Court were of Opinion, that it did not appear on the Record, that the other ſigned, ſealed, or delivered this Bond; but admitting it did appear that he ſigned and ſealed it, yet if it doth not appear that he delivered it, 'tis the Bond of the Defendant alone, tho' another is named therein with him, for 'tis not his Deed without the Delivery.

Boſtock *verſus* Boſtock.

Money paid in Diſcharge of Intereſt.

THE Caſe, upon the Maſter's Report, was as followeth:

ſt. A Bond was dated in the Year 1706, conditioned for Payment of a certain Sum of Money, and in the Year 1709, 100 l. Part of the Money, was paid; and by Indorſement, reciting, that there was 31 l. Intereſt then due, 'tis expreſſed to be paid in Diſcharge of the Principal; and now the Queſtion was, Whether the 31 l. Intereſt then due, ſhall be taken to be Part of the 100 l. then paid; if it is, then ſo much Intereſt is diſcharged, and by Conſequence ſo much continues Part of the Principal ſtill, for which Intereſt muſt be paid; whereas, if the 31 l. Intereſt was not diſcharged, no Intereſt would be due for it, becauſe 'tis originally Intereſt.

The Court ſeemed to incline, that the 100 l. then paid ſhould be in Diſcharge of the Intereſt then due, and for the Reſidue in Diſcharge of ſo much of the Principal.

Hawker *verſus* Hinton.

UPON a Writ of Error of a Judgment in the Common Pleas, the Error aſſigned was, a Variance between the Original and the Declaration, the one being Jemimman, the other Jememman Force. Continuances may be entered at any Time.

On the other Side it was ſaid, that the Record was right; and upon producing it, ſo it was, but it was of another Number-Roll. Econtra.

Then it was objected, that the Original was, anno 7 Georgii, and the Declaration was Anno 9, and no Continuances entered between the one and the other.

To which it was anſwered, that the Continuances might be entered at any Time, and that when entered the Plaintiff is intitled to his Judgment.

The Court was of Opinion, that the Attorney ought to be puniſhed for making up a ſecond Record, but that the Plaintiff muſt have his Judgment. Curia.

Crowther *verſus* Wheat.

SCire facias was brought againſt the Bail, and their Attorney demanded Oyer of the Writ, and ſaw many Raſures and Interlineations in it, and for that Reaſon he did not make any Defence, but now moved the Court, that all the Proceedings thereon might be quaſhed. A Writ altered after 'tis ſealed, this is a great Miſdemeanor.

The Court was of Opinion, that this was no Ground to quaſh the Proceedings, for if any Alteration was made in a Thing immaterial, after the Sealing the Writ, there is no Harm done; and if in any Thing material before the Writ was ſealed, yet that will not vitiate it; ſo the Court would not quaſh it, or any Proceedings thereon, but ſaid, if the Motion had been made againſt the Clerk who raſed it, and it appeared to be done after the Writ was ſealed, 'tis a Miſdemeanor, and puniſhable. Curia.

Anonymus. *In the Court of Exchequer.*

Where the Plaintiff muſt have a prerogative Adminiſtration, or take Adminiſtration in that Dioceſe where the Judgment was entered.

IN an Action of Debt againſt the Sheriff, the Caſe was thus:

ſ. A. by his Laſt Will and Teſtament made B. his Executor, and died; the Executor proved the Will before the Commiſſary of the Biſhop of Litchfield, and as Executor of A. brought an Action againſt C. and obtained a Verdict and Judgment, and thereupon C. was taken in Execution upon a Ca. ſa. and committed, and afterwards eſcaped.

Then B. the Executor died Inteſtate, and D. took out Adminiſtration cum Teſtamento annexato de bonis non of A. in the Dioceſe of Litchfield, and brought this Action of Debt againſt the Sheriff for this Eſcape, who demurred, for that the Judgment being the Foundation of this Action, and that being entered in Middleſex, the Plaintiff could have no Right to it by Virtue of an Adminiſtration taken in the Dioceſe of Litchfield, which as to this Demand was void, for he ought to have a prerogative Adminiſtration.

Econtra. But the Counſel for the Plaintiff inſiſted, that this Action would lie for two Reaſons:

(1.) Firſt, becauſe the Eſcape which was in the Dioceſe of Litchfield was the Principal and immediate Cauſe of the Action, and the Judgment ſet forth in the Declaration was only an Inducement to it.

(2.) The other Reaſon was, that it was not in the Power of the Executor to alter the Condition of his Teſtator, ſo as to put the Adminiſtrator to take out a prerogative Adminiſtration; for he took it cum Teſtamento annexato; ſo he ſhould have it in the ſame Condition it was in at the Death of the Teſtator; and one of the Barons was of that Opinion.

Curia. But three of the Barons, of which the Chief Baron was one, were of Opinion, that the Plaintiff could not maintain this Action without taking out a prerogative Adminiſtration, or an Adminiſtration where the Judgment was entered, and that was in the Dioceſe of London; that it was abſolutely neceſſary he muſt take out Adminiſtration ſomewhere, and that there could be no Inconvenience in taking out Adminiſtration above, according to the Caſe in Cro. Eliz. where it was held, that a Man dying in one Dioceſe, and having a Bond in another Dioceſe, in ſuch Caſe there muſt be a prerogave Adminiſtration, becauſe the Debt doth not follow the

Cro. Eliz. 472. Byron *ver.* Byron.

Perſon, but 'tis a Debt where the Bond is at the Time of the Deceaſe of the Inteſtate.

So in * Salkeld it was held, that Adminiſtration granted by the Archdeacon of Dorſet could be no Title to a Judgment in any of the Courts at Weſtminſter; 'tis true, a Will of a perſonal Eſtate which lies in a foreign Country, and none in England, may be † proved in that Country where the Eſtate is, and need not be proved here.

* Salk. 40. Adams *ver.* Savage.

† 1 Vern. 397. Jauncy *ver.* Scaley.

Rex *verſus* Burridge.

A Rule of Court was made, that the Sheriff of the County of Devon. ſhould bring the Freeholders Book before the Maſter of the Office, and that he ſhould return forty-eight Men, and that each of the Parties ſhould be at Liberty to ſtrike out Twelve, and that the Maſter ſhould appoint the Twenty-four remaining to be returned by the Sheriff to try the Iſſue joined between the Parties.

Special Jury by Conſent and not to challenge.

This Rule was made by Conſent, and afterwards when the Parties attended the Maſter, the Defendant ſtruck out ſome Hundredors, and at the Trial he challenged the Array for Want of Hundredors; and the Judge of Aſſiſe allowed the Challenge, and directed, that the Plaintiff in the Action might take what Remedy he could by Law.

Thereupon it was now moved for an Attachment againſt the Defendant, for that this Challenge to the Array was a Breach of the Rule of Court, and a Contempt thereof.

And it was argued for him, that his Entring into this Rule did not take from him the Liberty of Challenging the Jury; if it did, it muſt be by Implication, which could never be a good Foundation for an Attachment; for the Cauſe to iſſue out an Attachment ſhould be as certain as the Cauſe to warrant a Judgment, and there was never yet an Attachment granted in ſuch a Caſe.

For the Defendant.

There are Rules where there was an expreſs Injunction not to challenge; and there are other Rules where it was inſiſted on, but denied, as in the Caſe of The King *verſus* Tiffin, Paſchæ 29 Car. 2. a Rule was made (as in this Caſe) for Striking a Special Jury; and Jones Attorney General, moved, that it might be inſerted in the Rule, that neither of the Parties ſhould be at Liberty to challenge the Array; but it was denied; and it was not at that Time pretended, that this

this was implied in the Rule, for if it had, he need not have moved the Court, that it might be expreſſed.

In the Caſe of The King *verſus* Sheriff, anno 1 Georgii, theſe Words were added to the like Rule, (viz.) That neither Party ſhould challenge, *&c.* But admitting this was implied by the Rule, yet the Defendant cannot be ſaid to be guilty of a Contempt for Challenging the Array, for 'tis no more than an Inadvertency, or a Miſtake of the Senſe and Meaning of the Rule.

Now the different Way of Drawing up theſe Rules, ſheweth, that there muſt be an expreſs Conſent of the Parties not to challenge; otherwiſe no Attachment will lie for Challenging, neither will ſuch Conſent take away any legal Objection the Party hath to challenge; and if ſuch a Rule (as in the principal Caſe) would ſerve, what Reaſon can be given why an expreſs Conſent ſhould be put in ſo many Rules for Striking Special Juries.

Judgment given by a Judge of Aſſiſe after he came to Town.

Beſides, this Matter hath received Judgment already, for the Rule was produced at the Aſſiſes, and pleaded in Bar to this Challenge, and the Defendant demurred to it, and the Plaintiff joined in Demurrer; and when the Judge came to Town he gave Judgment for the Defendant, at which the Chief Juſtice ſeemed to be ſurpriſed, that a Judge ſhould give Judgment after he came to Town; but the Counſel for the Defendant ſaid he might, when it was by the Conſent of the Parties; as where a Verdict is found, and the Judge takes Time to conſider what Judgment to pronounce, or what Fine to ſet; and for theſe Reaſons it was inſiſted, that no Attachment ſhould go.

Eccontra.

It was inſiſted for the Attachment, that this Challenge was a Contempt to the Court, and a Breach of their Rule, for that was, that the Maſter ſhould appoint Twenty-four to be returned by the Sheriff to try the Iſſue; now this Challenge to the Array deſtroyed this Rule, for it was a Superſedeas of the whole Return, like a Rule of Court or Bond to ſtand to an Award; yet if the Party retracts the Submiſſion, 'tis a Breach of ſuch Rule, and a Forfeiture of the Bond, both which are implied in the Submiſſion, for qui adimit medium deſtruit finem.

The Defendant might have taken a Challenge to the Polls, but he knew that would be ſupplied by Taleſmen; therefore to make all ſure, and to prevent the Trial, he took a Challenge to the Array for Want of Hundredors, and this with an Air

of Inſolence, after he had been ſummoned to appear before the Chief Juſtice of this Court, and had his Opinion, that he (the Defendant) could not ſtrike out all the Hundredors; for which Reaſons it was inſiſted, that the Attachment might iſſue.

The Court was of Opinion, that the Defendant was guilty of a premeditated Contempt, becauſe his Challenge drawn up in Form, and arraigned at the Aſſiſes, ſhews his Deſign was to put off the Trial. Curia

As to the Rule made in this Caſe, it may be without the Conſent of the Parties, as well where the Trial is by Niſi prius as at Bar, and that likewiſe in Criminal Caſes as well as Civil, and without any Infringement of the Liberty of the Subject, but rather for the Sake of Juſtice, and to preſerve their Liberties; and if ſuch Challenges are good, theſe Rules would be avoided and made uſeleſs, which is a Contempt of this Court; and the Caſe cited between The King and Tiffin, to ſhew, that the Party may challenge, if 'tis not expreſſly prohibited in the Rule, is wrong; for tho' 'tis not expreſſed, yet if it be neceſſarily implied, the Power of Challenging is taken away; for otherwiſe theſe Rules would be to little Purpoſe.

Now this Rule is, that the Iſſue ſhall be tried per reſiduum Juratorum, but Challenging the Array is as much as to ſay, it ſhall not be tried by that Jury, and that the Sheriff ought not to return them, when he was bound by the Rule to return thoſe, and no other.

Now, as the Court hath a Power to inforce Obedience to their own Rules; 'tis but reaſonable they ſhould puniſh thoſe who break them; ſo the Rule was made abſolute for an Attachment.

Afterwards the Defendant Burridge gave Bail on the Attachment, and Mr. Crews, who was his Attorney and Under-Sheriff, was one of the Bail; then the Proſecutor moved, that the High Sheriff might return the Jury to try this Cauſe, becauſe the Under-Sheriff, who hath Retorna Brevium, was Attorney in the Cauſe and Bail on the Attachment; and a Motion was made for a Special Jury; and a Queſtion being put, Whether that could be granted without the Conſent of the Parties; the Maſter of the Office was ordered to ſearch for Precedents; and he reported, that above thirty Years ago there were ſeveral Precedents for Special Juries upon Trials by Niſi prius, without Conſent of the Special Juries without Conſent of Parties.

the Parties; but that in the laſt thirty Years there were ſeveral Motions made for that Purpoſe, but always denied.

To which the Chief Juſtice anſwered, that if the Court could once grant Motions for Special Juries, without the Conſent of the Parties, to try Cauſes at the Aſſiſes, as it appears by the Precedents they might; it was diſcretionary in the Court, Whether to grant ſuch Motions, or not; for tho' it was often denied, it cannot be inferred from thence but that the Court may ſtill do it, where it ſeems reaſonable for them ſo to do.

But all the other three Judges were of another Opinion, becauſe the Sheriff is the proper Officer to return Juries; and if there is no legal Exception againſt him, the Court cannot ſlip him and order another to ſtrike a Special Jury, without the Conſent of the Parties, to try an Iſſue at the Aſſiſes; but if there is any lawful Objection againſt him, and it appears to be ſo upon Affidavit made, then a Special Jury may be ſtruck by the Maſter of the Office, without the Conſent of the Parties; now, all that was ſhewn in this Caſe, why there ſhould be a Special Jury, was, that the Defendant made Affidavit, that he feared he could not have a fair Trial without ſuch a Jury; then it was offered as a Reaſon why there ſhould be a Special Jury to try this Cauſe at the next Aſſiſes, becauſe ſuch a Jury was thought requiſite to try it at the laſt Aſſiſes.

But three of the Judges were of Opinion, that a Special Jury might be granted to try a Cauſe at Bar without the Conſent of the Parties, but never at the Niſi prius, unleſs very good Cauſe was ſhewed, and that the Cauſe now ſhewed was not ſufficient; therefore ſince the High Sheriff is the proper Officer to return Juries, and there is no Imputation againſt him (as there was not in this Caſe) the Court would not vary from him without the Conſent of the Parties; ſo he was ordered to return this Jury; and in the ſame Term there was another Motion for a Special Jury in a Caſe between Goodright and Miſt; and the like Rule was made.

Anonymus.

Indictment for Stealing the Goods of an unknown Perſon.

AT a Seſſions of Oyer and Terminer held at the Old Baily in April laſt, this Caſe happened, (viz.) A looſe and idle Perſon was apprehended at Southampton, and being brought before a Juſtice of Peace, a ſilver Tankard was found

found in his Poſſeſſion; and he giving no ſatisfactory Account how he came by it, and the Juſtice ſuſpecting he ſtole it, committed him to Priſon; and being brought by Habeas Corpus to Newgate, he was indicted for Stealing a ſilver Tankard, Value 10 l. of the Goods and Chattels of a Perſon unknown; and at the Trial the Proſecutor offered to give Evidence, that this was a looſe and diſorderly Perſon, and therefore it muſt be preſumed, that he could have no Property in the Tankard, but that he ſtole it.

But Baron Gilbert, who was then in Court, ſaid, that tho' an Indictment might be good for Stealing the Goods cujuſdam ignoti, yet a Property muſt be proved in ſome Body at the Trial, otherwiſe it ſhall be preſumed that the Property was in the Priſoner, by his Pleading Not guilty to the Indictment; for a Man ſhall not be found guilty of Felony, and hanged upon Preſumption.

Baggott *verſus* Oughton.

UPON a Caſe ſtated, and referred out of the Chancery for the Judgment of this Court, it was thus:

Power to make Leaſes reſerved in a Marriage-Settlement.

ſſ. Sir Edward Baggot (the Father of the Plaintiff) upon his Marriage with his Wife, the Plaintiff's Mother, in Conſideration of that Marriage, and of a conſiderable Sum of Money which he was to have with her as a Marriage-Portion, which could not be raiſed otherwiſe than by ſelling her Father's Eſtate; and ſhe being the only Child of the Family; and for that Reaſon, Sir Edward being unwilling the Eſtate ſhould be ſold, it was agreed by Indenture between them, that a Fine ſhould be levied of the Lands, and the Uſes thereof declared to Sir Edward, for Life, then to the Uſe of his Wife for Life, Remainder to the Plaintiff in Tail, &c. Reverſion in Fee to the Lady Baggott, in which Settlement there was a Proviſo, that the Lady Baggott ſhould have Power to charge the whole Eſtate with the Payment of 5000 l. to any Perſon to whom ſhe ſhould give the ſame; and with a farther Power, that any Perſon who ſhould be actually ſeiſed of the Lands by Virtue of this Settlement, might make a Leaſe or Leaſes for three Lives, or for twenty-one Years, of all or any Part of the Premiſſes in the Indenture or Fine comprized at ſuch yearly Rents, or more, as the ſame were then let at.

Sir Edward Baggott died, and the Lady Baggott being the next in Remainder for Life, entered, and afterwards married Sir Adolphus Oughton (the now Defendant) and then made a Leaſe to him of the capital Meſſuage for twenty-one Years, but reſerved no Rent, and about a Month afterwards ſhe died; and the ſingle Queſtion now before the Court for their Opinion was,

Whether this was a good Leaſe?

And it was argued for the Plaintiff, that it was not, becauſe this capital Meſſuage being never yet let, by Conſequence there was no Rent reſerved at the Time of making this Settlement, therefore this Power can never be purſued, and for this the Lord * Mountjoy's Caſe was cited as an Authority in Point, which was thus:

* 5 Rep. fo. 3.

If Tenant in Tail, with a Power to make Leaſes, &c. reſerving the antient Rent, made a Leaſe of two diſtinct Farms, reſerving the antient Rents out of both the Farms in one entire Sum; this was adjudged a new Rent, and not the old accuſtomed Rent; and that if he reſerve a leſs Sum than the accuſtomed Rent, the Leaſe is void.

† 6 Rep 32.

So in † Fitzwilliams's Caſe it was reſolved, that Powers by which the Intereſt of Strangers ſhall be charged, muſt be taken ſtrictly, as a Power to make Leaſes for 21 Years; he who hath ſuch a Power cannot make a Leaſe for 21 Years to commence in futuro.

The Power in the principal Caſe reſerved to make Leaſes was intended for the Benefit of the Family, (viz.) To make Leaſes of ſuch Lands which had been actually, antiently, and uſually let; and tho' it was indefinitely to make Leaſes of all, or any Part of the Premiſſes compriſed in the Indenture or Fine, yet theſe Words are reſtrained in the latter Part of the Sentence to ſuch Leaſes, where the yearly Rents, or more, were reſerved, as the ſame were let at when the Settlement was made; and the Authorities in the * Margin were cited, to prove that general Words in a Deed are to be qualified and reſtrained by particular and ſubſequent Words in the ſame Clauſe.

* Moor 832.
1 Roll. Rep. 375.
2 Roll. Rep. 278.
3 Rep. 154.
Hob. 275.
Litt. Rep. 345.
1 Jones 22, 26.
3 Lev. 274.
Shower 150.

'Tis true, this Lady had an Intereſt coupled with her Power, but her Intereſt in Reſpect to any Charge to affect the Remainder-Man is intirely void; for this Leaſe, as to him, muſt ariſe out of her Power, and is no more than if made by an Attorney; now, ſuppoſing ſhe had made a Leaſe of Lands not in Poſſeſſion, ſuch Leaſe would have been abſolutely void, neither ſhall a Leaſe, without Rent reſerved,

be good to charge the Plaintiff, who is the Remainder-Man.

Beſides, Sir Walter Baggott (the now Plaintiff) is a Purchaſer of this Eſtate under the ſaid Settlement, and is Heir at Law both to Sir Edward and the Lady to whom this Power was reſerved; and all Powers given to Tenants for Life ſhould be * ſtrictly conſtrued, becauſe they make the Eſtate to continue as a Charge on thoſe in Remainder; therefore the Words, (viz.) To make Leaſes, *&c.* at ſuch yearly Rents, or more, as the ſame were then let, muſt reſtrain this Power to make Leaſes only of ſuch Lands which were let at that Time.

* 8 Rep. 70. 2 Cro. 318, 458. 1 Roll. 12. Palm. 104. 3 Mod. 378. Salk. 537.

On the other Side it was argued for the Defendant, that this was a good Leaſe, and well warranted by the Power, which is for the Tenant in Poſſeſſion to make Leaſes of all, or any Part of the Lands comprized in the Indenture or Fine, &c. Econtra.

Now, if the Power had reſted there, this Leaſe had been certainly good, and nothing could be objected to make it otherwiſe; but it hath been ſaid, that the ſubſequent Words, (viz.) To make Leaſes at ſuch yearly Rents, as the ſame were let at that Time, reſtrains this Power to Lands which were then let, and this capital Meſſuage being never let, this Power could never extend to it.

But theſe ſubſequent Words are only explanatory of the firſt Part of the Sentence, (viz.) That the Lands uſually let may be leaſed at the uſual Rent; now, by the firſt Part of the Proviſo, the Tenant in Poſſeſſion had Power to make Leaſes of all, or any Part of the Lands comprized in the Settlement; and the ſubſequent Part of the Clauſe ſhall not control that Power without negative Words, and there are no ſuch Words in this Caſe.

Beſides, this Power is reſerved to the Lady Baggott, who had the Inheritance of theſe Lands, and from whom all the Eſtates in the Settlement moved; and 'tis not a Power ſuperadded to the Eſtate of a third Perſon, ſo ſhould have a very * favourable Conſtruction.

* 2 Vent. 350.

As to the Lord Mountjoy's Caſe, there are ſome Points reſolved, which have ſince been denied to be Law; and in 2 Roll. Abr. 262. there is a contrary Reſolution, but the Caſe of † Walker *verſus* Wakeman is full in Point, ſ. It was a Conveyance of Lands by a common Rectory, to the Uſe of T. S. for Life, with a Power to make a Leaſe of the Premiſſes, or of any Part thereof, ſo as 5 s. Rent was reſerved

† 1 Vent. 294. 2 Lev. 150.

ſerved for every Acre of Land; the Tenant for Life made a Leaſe of the Rectory, reſerving a Rent; now this not being Land, but conſiſting in Tithes, the Queſtion was, Whether this Leaſe was warranted by that Power; and adjudged that it was, becauſe the reſtrictive Clauſe was in the Affirmative, and ſhall not reſtrain the general Words in the preceding Part of the Sentence; 'tis true, the Lord Chief Juſtice Hale ſaid, that if this had been Res integra, he ſhould have been of another Opinion.

Now, as to the Conſtruction of Powers, 'tis various, according to the Intent of thoſe by whom they were created, for ſometimes they are conſtrued liberally, and ſometimes very ſtrictly; but the Power in the principal Caſe being reſerved to her who had the Inheritance of the Eſtate originally before the Settlement was made, is Part of her old Dominion; and where the Execution of ſuch a Power is agreeable to the Intention of the Donor, and conſiſtent with his Will at the Time it was created, it muſt have a very liberal and favourable Conſtruction; and this was the concurrent Opinion of the Court of Chancery in the laſt Term, aſſiſted by the Maſter of the Rolls, and by Baron Gilbert and Price, in the Caſe of the Lord and Lady Coventry.

To which it was anſwered, that 'tis not material whether the Eſtate moved from the Lady Baggott, as being her Inheritance before this Settlement was made, becauſe the Court will judge of this Power as it appears upon the Face of that Settlement.

'Tis true, there are no negative Words ſimply in the ſubſequent Part of this Clauſe to controul the Power given in the precedent Part; but there are reſtrictive Words, which imply a Negative, and reſtrain the Tenant from overcharging the Reverſioner.

'Tis to be obſerved, that the Lord Chief Juſtice Vaughan, in delivering the Opinion of the Court in a Caſe * reported by him, ſaid, that where Power is given to make Leaſes of Lands for twenty-one Years, reſerving the Rents which were thereon reſerved at the Time of the Making the Deed, that in ſuch Caſe the Lands demiſable by that Power, muſt be Lands then in Leaſe on which ſome Rent is reſerved; and the Court was unanimous of that Opinion for the Plaintiff in this Caſe.

* Vaugh. 35.

DE

Term. Sanct. Trin.

Anno 10 Georgii, 1725.

Shaw *verſus* Way.

IN a Special Verdict in Ejectment, the Caſe was thus: *ſ.* Thomas Ravenſcroft being ſeiſed in Fee of Lands, &c. in the Pariſh of Hawarden in the County of Flint, did by his Laſt Will deviſe the ſame unto Dorothy his Wife, for Life; and farther, he deviſed to his ſaid Wife the Sum of 500 l. to be raiſed by her, or by her Executors, &c. by Sale of Timber-Trees, or by Sale of any Part of the Lands, or by digging, ſinking, getting, and Sale of Coals on the Premiſſes, &c. at her Choice, or at the Election of her Executors; and that if his ſaid Wife ſhould die before the ſaid Sum of 500 l. was raiſed, then he gave her Power, either by Deed or Will, in her Life-time, to appoint any Perſon to raiſe the ſame after her Death, in Manner as aforeſaid; but if either of his Siſters, Anne Lunsford, or Dorothy Evatt, or the Truſtees named in his Will, ſhall pay unto his ſaid Wife, or to her Executors, &c. the ſaid Sum of 500 l. then the Power of ſelling Timber, &c. ſhall ceaſe.

Where a Man may have a Fee-ſimple by Deviſe without the Word *Heirs*: And where the Deviſees take an Eſtate for Life with contingent Remainders, *&c.*

And after the Deceaſe of his ſaid Wife, he deviſed the ſaid Lands to Francis Bramſton, Serjeant at Law, Charles Nott, and Edward Parry, and to the Survivor * and Survivors of them, (ſubject to the raiſing the 500 l.) upon Truſt for his ſaid Siſters, equally between them during their Lives, without committing any Waſte; and that if they happen to die leaving Iſſue or Iſſues of their Bodies, then in Truſt, that the Mother's Share ſhall be for ſuch Iſſue or Iſſues, or elſe in Truſt

* But did not ſay to their Heirs.

Truſt for the Survivor or Survivors of them, and their reſpective Iſſue or Iſſues; and that if * both his ſaid Siſters ſhall die without Iſſue, or having Iſſue, ſuch Iſſue ſhall die without Iſſue, then the ſaid Truſtees ſhall ſtand and be entruſted for John Swift, and the Heirs Males of his Body; and for Want of ſuch Iſſue, then in Truſt for Ravenſcroft Gifford, and the Heirs Males of his Body, with ſeveral Remainders over.

*This makes croſs Remainders.

They find, that Thomas Ravenſcroft died ſeiſed of the Premiſſes without Iſſue, and that Dorothy his Widow ſurvived and entered, and died ſeiſed; that after her Death Anne Lunſford, and Dorothy Evatt entered and were ſeiſed, and that Anne Lunsford died, never having any Iſſue, and that Dorothy Evatt ſurvived; and that after the Death of the ſaid Anne, ſhe entered on the Whole, and was thereof ſeiſed, and levied a Fine at the Grand Seſſions in Flintſhire, anno 4 Jac. 2. of the Premiſſes, by the Name of four Meſſuages, &c. and declared the Uſes thereof to Thomas Williams, and his Heirs, until a common Recovery ſhould be had, &c. and that in the ſame Year a common Recovery was ſuffered in the ſaid Court, and the Uſes thereof declared to the ſaid Dorothy Evatt, her Heirs and Aſſigns for ever.

They farther find, that the ſaid Dorothy Evatt was Heir at Law to the Teſtator, and that John Swift was dead without Iſſue.

That Ravenſcroft Gifford, anno 1693, and in the Life-time of the ſaid Dorothy Evatt and John Swift, went beyond Sea, and there continued twenty-ſix Years, until the Year 1719, that the ſaid Francis Brampſton and Charles Nott died in the Life-time of Edward Parry; that the ſaid Dorothy Evatt died anno 1698, without Iſſue, and that ſhe never had any Iſſue of her Body; that the ſaid Ravenſcroft Gifford entered and was ſeiſed, and being ſo ſeiſed, he demiſed the Lands to William Shaw, the Plaintiff, anno 5 Georgii, for ſeven Years, by Virtue of which Demiſe he entered and was poſſeſſed, until he was ejected by the Defendant, and ſo they make a general Concluſion.

This Caſe came before the Court by Writ of Error from the Grand Seſſions of Wales, where Judgment was given for the Defendant, and the Counſel for the Plaintiff made theſe Queſtions.

(1.) What Eſtate the Truſtees took by this Will? what Eſtate the two Siſters had? (i. e.) Whether they

5 (2.) Took

(2.) Took an Eſtate for Life in Common, or an Eſtate-tail.

(3.) Whether Judgment ought to be given for the Plaintiff for a Moiety, no croſs Remainders being limited by the Will to the Siſters.

(1.) And as to the firſt Point it was argued, that the Truſtees had a Fee-ſimple, tho' the Deviſe was not expreſly to them and their Heirs; for if they ſhould have a leſs Eſtate it would not ſupport the Truſts which were afterwards limited in this Will, ſo that the Intent of the Teſtator would not be compleated, becauſe the ſeveral Deviſes afterwards made muſt ariſe out of the Eſtate deviſed to them.

And tho' in Feoffments or Grants, the Word Heirs is neceſſary to raiſe a Fee, yet 'tis otherwiſe in Wills, for there any Words which ſhew, that the Teſtator intended to paſs a Fee, will be ſufficient to make it ſo; as for Inſtance; a Deviſe of Lands to T. S. for ever; ſo a * Deviſe of Lands to his Wife for Life, Remainder to his eldeſt Son, paying to his Brothers and Siſters 40 s. a-piece; here was no Eſtate deviſed to the eldeſt Son, but the Word Paying made it a Fee-ſimple.

* Willock v. Hammond. Cro. Eliz. 204. 3 Rep. 20. S. C.

So a Deviſe to his Son, paying 3 l. per Annum to his Brother; this was adjudged a Fee-ſimple in the Son, becauſe the Charge to his Brother might ſurvive and continue after the Death of the Deviſee; and ſo 'tis in all Caſes where the Word Paying is collateral, (i. e.) Where 'tis not ſaid out of the † Profits of the Land; ſo a Deviſe of all his real Eſtate paſſes a Fee, becauſe the Word Eſtate being Genus Generaliſſimum, comprehends the Whole, both real and perſonal; and the Words ** All my Eſtate, are a Deſcription of the Fee; ſo a Deviſe of all his Lands of Inheritance, if the Law will permit; it was adjudged that a †† Fee paſſed.

Spicer *verſus* Spicer. Godb. 280. 2 Cro. 527. S. C. 2 Roll. Rep. 80. S. C. † Walker *verſus* Collier. Cro. Eliz. 378. 6 Rep. 16. S. C. ** *Counteſs of* Bridgwater *verſus The Duke of* Bolton. 1 Salk. 236. S. C. 1 Roll. Abr. 835. S. C. †† Whitlock *verſus* Harding. Moor 873. Godb. 207. Hob. 2.

So when the Teſtator was ſeiſed in Fee, and deviſed four Coats to four poor Boys of the Pariſh of C. for ever; and all his Lands to his Wife Margaret, and her Aſſigns; adjudged, that * Margaret had a Fee-ſimple, becauſe ſhe took the Lands with a perpetual Charge.

* Smith *ver.* Tindall. 2 Salk. 685.

So in the principal Caſe it plainly appears, that the Teſtator intended the Truſts appointed in his Will ſhould be ſupported,

ported; and if that cannot be done but by an Eſtate in Fee, the Truſtees muſt neceſſarily have ſuch an Eſtate; and if they took a Fee-ſimple, then the Truſts are executed by the Statute of Uſes, and then Ravenſcroft Gifford (the Leſſor of the Plaintiff) had an Eſtate-tail executed in him.

(2.) The ſecond and the chief Queſtion was, what Eſtate the Siſters took by this Will; and as to that Point it was argued, that they took an Eſtate for Life only, with contingent Remainders in Tail to their Iſſues, and that it was the Intention of the Teſtator, that they ſhould have no larger an Eſtate, becauſe of that Reſtriction in his Will, from committing Waſte, and an expreſs Power of digging Coal; both which would have been implied if he had intended them an Eſtate-tail; therefore theſe Things are a ſufficient Indication of his Intent to give them an Eſtate for Life only.

As to that Clauſe, ſ. If either of them die leaving Iſſue or Iſſues of their Bodies, then in Truſt, that the Mother's Share ſhall be for ſuch Iſſue or Iſſues, or elſe in Truſt for the Survivor or Survivors of them; this is a joint Eſtate-tail to the Iſſue, upon a Contingency; for otherwiſe the Word Survivors would be inconſiſtent, becauſe there were but two Siſters, for there could be no Survivors between Two.

'Tis true, if the Deviſe had been to them for Life, and after their Death to their Iſſue, that would have been an Eſtate-tail; as for Inſtance; a Deviſe to * Bernard for Life, and after his Deceaſe, to the Iſſue of his Body; this was adjudged an Eſtate-tail.

* King *ver.* Melling. 2 Lev. 58. 1 Vent. 214.

But the Caſe of Loddington *verſus* Kime is in Point, which was thus: ſ. A Deviſe to his Uncle for Life, without Impeachment of Waſte, and if he hath Iſſue Male, then to ſuch Iſſue Male and his Heirs for ever, and if he die without Iſſue Male, then to his Nephew in Fee; this was adjudged an Eſtate for Life in the Uncle; for if the Teſtator had intended an Eſtate-tail, it had been impertinent to have added theſe Words, (viz.) Without Impeachment of Waſte; and the Inheritance being veſted in the Iſſue Male and his Heirs, theſe Words his Heirs, make it certain what Iſſue Male was intended; then the ſubſequent Clauſe, (viz.) If he die without Iſſue, muſt be conſtrued to relate to what went before, (viz.) If he die without ſuch Iſſue then living, who might take the Inheritance as before directed by the Will, for otherwiſe thoſe Words would make an Eſtate-tail by Implication, to deſtroy an expreſs Eſtate before limited to the Iſſue Male and

3 Lev. 431. Loddington *ver.* Kime.

his Heirs; ſo in this Caſe the Will being, that if both his Siſters die without Iſſue, it muſt be intended Iſſue then living, and capable of Taking the Inheritance.

Beſides, all the Deviſes over being expreſsly in Tail, ſhew, that the Teſtator intended only an Eſtate for Life to his Siſters.

(3.) As to the third Point, Whether Judgment ſhould be given for the Plaintiff for a Moiety, if the Court ſhould be of Opinion, that the Siſters had an Eſtate-tail; it was argued that it ſhall, becauſe the Siſters being Tenants in Common, in ſuch Caſe, after the Death of either of them without Iſſue, the Remainder takes Place immediately with Reſpect to her Moiety, and the Word Survivors muſt relate to their Iſſue.

On the other Side, the firſt Point was agreed, that the Truſtees took an Eſtate in Fee for the Reaſons before-mentioned; ſo it was chiefly argued upon the ſecond Point, (viz.) That the Siſters took an Eſtate-tail with croſs Remainders to their Iſſue, which may be inferred from theſe Words, (viz.) If either of my Siſters happen to die, leaving Iſſue or Iſſues of their Bodies, and if both die without Iſſue, then in Truſt for Ravenſcroft Gifford, &c. Econtra.

Now 'tis certain, that the Word Iſſue is as effectual to create an Eſtate of Inheritance, as the Words Heirs of the Body; 'tis mentioned in ſeveral Statutes, and particularly in the Statute de Donis, &c. and in the Statute of * Wills; ſo as to the Veſting and Continuing of Eſtates, 'tis the ſame, and as effectual as the Words Heirs of the Body; and 'tis more comprehenſive than a Deviſe to one for Life, and after his Deceaſe to his Children, which was † Wild's Caſe; 'tis true, in that Caſe it was held an Eſtate for Life in the Deviſee, becauſe he had a Son and Daughter then living; but if there had been none then living, this would have been an Eſtate-tail; and ſo it muſt be in this Caſe, and for the ſame Reaſon, (viz.) Becauſe the Siſters never had any Iſſue. * 32 H. 8. † 6 Rep. 16. Moor 397.

So a Deviſe to his Wife for Life, and afterwards to her Son, and if he die without Iſſue, having no Son, Remainder over; adjudged an Eſtate-tail in the Son. Moor 127. 1 Roll. Abr. 837. *See* 1 Vent. 230. 1 Lev. 290.

So in a late Caſe in the Exchequer, which was thus: *Sir.* Sutton deviſed his Lands to Thomas Sutton for Life, Remainder to his firſt Son in Tail; and if Thomas Sutton and his Wife ſhall die without Iſſue, Remainder to charitable Uſes; a Bill was exhibited in the Exchequer to eſtabliſh this Charity, and the Defendant pleaded, that Thomas Sutton ſuffered a common Recovery, and declared the Uſes to himſelf Sutton *verſus* Sammon. Hill. 7 Geo.

ſelf and his Heirs, which Plea was allowed; 'tis true, that upon an Appeal to the Houſe of Lords, the Defendant was ordered to anſwer, but it was on the Foot of being a Deviſe to a Charity; and tho' the Teſtator might intend it for a Charity, yet ſince by Operation of Law it was an Eſtate-tail, that muſt be obſerved.

(3.) As to the third Point, admitting this is an Eſtate-tail in the Siſters, then they will have croſs Remainders by Implication; and for this the Caſe of * Holmes and Meynell is an Authority in Point.

* Raym. 452. T. Jones 172.

ſſ. The Teſtator deviſed his Lands to his two Daughters and their Heirs, equally to be divided between them, and if † they die without Iſſue, then all his Land to his Nephew Francis in Tail; the youngeſt Daughter died without Iſſue: Adjudged, that the ſurviving Siſter ſhall have the Whole by Implication, for that the Daughters had ſeveral Eſtates-tail by Moieties, and the Survivor ſhall have the Whole by Way of croſs Remainder, and Francis ſhall have nothing by Implication, but muſt ſtay till both the Daughters are dead without Iſſue.

† 'Tis not ſaid, If either of them die.

Therefore if Dorothy Evatt, who ſurvived her Siſter, had the whole Eſtate by Way of croſs Remainder, ſhe having ſuffered a common Recovery, all the Remainders over are barred thereby.

It was admitted on the other Side, that where there is a Deviſe to one for Life, and after his Death to his Iſſue, Remainder over, this is an Eſtate-tail; and ſo it was adjudged in Melling's Caſe, which doth not differ from the preſent Caſe; for here the Deviſe was to his Siſters for Life, and if they die without Iſſue, Remainder over; ſo that in the one Caſe a Remainder is limited after a Dying without Iſſue, and in the other Caſe it was limited, if they die without Iſſue.

So in the Caſe of Langly *verſus* Baldwin, which was referred out of Chancery to the Judges of the Common Pleas for their Opinion, which was thus: ſſ. The Teſtator deviſed his Lands to Jonathan Langly for Life, Remainder to his firſt, ſecond, third, and fourth Sons, &c. in Tail, with a Power reſerved to him to make a Jointure, &c. and if he die without Iſſue, Remainder over; the whole Court agreed, that he took an Eſtate-tail.

As to the concomitant Clauſes, if the Words in a Will are ſufficient to raiſe an Eſtate-tail, theſe Clauſes, (viz.) With or without Impeachment of Waſte, or any Power to raiſe Money, by cutting and ſelling Timber, or otherwiſe, ſhall not control the Deviſe.

As to the Case of Loddington *versus* Kime, it comes near to the present Case, but yet 'tis not an Authority in Point; for there the Devise was to one for Life; and if he hath Issue Male, then to such Issue Male and his Heirs: Now there the Inheritance being vested in the Issue Male and his Heirs, these Words his Heirs are a Description of the Person who is to take; but in the present Case there is no Description of the Person who is to take as Issue; therefore it must be such Issue who is living at the Time of the Death of the Sisters; and if so, then 'tis a proper Limitation and not a Purchase, and the rather because the Devise is expressly to the Sisters for Life, and to their Issue only on a Contingency; but if it had been to them for Life, and that if they die without Issue, Remainder over, that would be an Estate-tail, and all the Costs cited on the other Side prove no more.

As for the concomitant Clauses in this Will, (viz.) with or without Impeachment of Waste, or a Power to raise Money by Sale of Timber, &c. it hath been objected that they are only directory, and shall not control the granting Part of the Will, which is very true; but where the Devise is to be collected from the Intention of the Testator, and to be supported only by Implication, certainly those Clauses are good to explain what the Testator intended.

(3.) As to the third Point, (viz.) if the Sisters have an Estate-tail, then whether cross Remainders are limited to them by this Will; this Question entirely depends on these Words, (viz.) the Survivor or Survivors of them; the Clause is, If his Sisters die leaving Issue of their Bodies, then the Mother's Share shall be for such Issue or Issues, or else for the Survivor or Survivors of them; now it was argued, that the Word Survivors must of Necessity relate to the Issue; for otherwise it would be inconsistent, because there being but two Sisters, 'tis impossible it should relate to them, for there can be no Survivors between two; therefore it must relate to the Issue; and if so, the Sisters took no Estate by cross Remainders; therefore Judgment ought to be for the Plaintiff in Error for a Moiety.

It was held clearly by the Court as to the first Point, that the Trustees had a Fee-simple; for where it appears upon the Face of the Will, that the Testator intended to give such an Estate by necessary Implication, as by limiting such Trusts which could not be supported, unless the Trustees had a * Fee-simple, in such Case a Fee shall pass to them, and that the Trusts were executed by the Statute of Uses. Curia. * 1 Roll. Abr. 611.

As to the Second which was the chief Point, the Chief Justice was of Opinion, that this was not a contingent Remainder in Tail to the Issue of the Sisters, and that a Limitation to the Issue doth not differ from a Limitation to the Heirs of the Body; 'tis true it hath been held, that where an express Estate for Life is devised, in such Case no subsequent Words shall create an Estate-tail by Implication; but this is an old antiquated and exploded Opinion, and contrary to the later Authorities; and in this Case the subsequent Words, (viz.) without committing Waste do not control the Devise.

'Tis true where an Estate for Life is devised to one, with a Provision immediately for all his Sons successively, and if he die without Issue, Remainder over; in such Case the Devisee hath but an Estate for Life, because these Words if he die without Issue, shall be intended a Dying without such Issue as are expressed in the Will; and upon this Distinction the Case of * Popham and Bamfeild was adjudged; for there is a great Difference between a Devise to T. S. for Life, and if he die without Issue, Remainder over, and a Devise to T. S. (without expressing for what Estate) and if he die without Issue, Remainder over.

* Salk. 236.

(3.) As to the third Point, they all agreed if the Sisters took an Estate-tail, then they had cross Remainders by Implication, for the subsequent Words being, if both die without Issue, or having Issue, such Issue die without Issue, Remainder over; this Remainder was not to be executed until both Sisters died without Issue; they allowed that cross Remainders would not rise to more than two by Implication; but in this Case there were but two Sisters, so such Remainders may very well rise to them.

This was the Opinion of the Court upon the first Argument, but no Judgment was given, for they took him to consider, and order'd a second Argument; and afterwards in Easter-Term 11 Georgii, it was argued again, and the Counsel for the Plaintiff in Error insisted, that the Sisters had only an Estate for Life; and this depended upon such Construction as the Court should make of the Word Issue, which is no legal Word of Limitation; therefore it cannot be a Limitation in a Will otherwise than by Intendment; and if so, then it must be shewn on the other Side that the Testator intended it as a Limitation; and in King and Melling's Case before-mentioned, the Argument of the Lord Chief Justice Hale was founded on the Intent of the Testator; but

in that Case it was necessary to give a Power to make a Jointure, in order to continue the Estate-tail undestroy'd.

Now in the principal Case there being an express Estate devised to the Sisters for Life, those concomitant Clauses, (viz.) the giving them Power to raise 500l. by digging Coal, or selling Timber, and restraining them from committing Waste, shew that the Testator intended they should have an Estate for Life only; for if he had intended an Estate-tail, such a Power and such a Restriction had been impertinent and void; so that taking the whole Matter together, it shews that the Testator did not want Advice in making this Will; therefore it ought not to have so liberal a Construction, as otherwise it would, if there had been no such Clauses to lead the Judgment of the Court, and to explain the Intention of the Testator.

A Devise to his Son for Life & non aliter, and to his Sons, as adjudged an Estate for Life only in the Son.

So in the Case of Backhouse and Wells 9 Annæ, a Devise to T. S. for Life only, without Impeachment of Waste; and if he died leaving Issue, then to such Issue and the Heirs of such Issue; this was adjudged an Estate for Life only.

'Tis manifest that the Words Issue or Issues in a Will, may be Words either of Limitation or of Purchase; but in this Will, the Words being if the Sisters die leaving Issue of their Bodies, then in Trust for such Issue or Issues, or else for the Survivor or Survivors of them; there the Word Survivors sheweth, that the Testator intended the Words Issue or Issues to be Words of Purchase, because that Word must necessarily relate to the Word Issue, and then the Sentence would be thus, (viz.) in Trust for the Issue or Issues, and the Survivors of them; it could not be in Trust for the Sisters and the Survivors of them, because there were two and no more, and there can be no Survivors between two.

Then * Hilly and Taylor's Case was cited, which is reported in Cro. Eliz. by the Name of † Clerke *versus* Day, which was thus, (viz.) The Husband devised the Lands to his Wife for Life; and that if she married after his Decease, and had any Heirs of her Body, then after her Decease, that Heir should have it, and the Heir of the Body of such Heir; and if she died without Issue, Remainder over: Adjudged that the Wife had only an Estate for Life, because the Words if she die without Issue being grafted on the Word Heir, do plainly shew that the Word Heir was used as a Designation of the Person, and not as a Limitation of the Estate; and that

* Owen 148.
† Cro. Eliz. 313. Moor 593. 1 Roll. Abr. 839.

that immediately upon the Death of the Wife, the Inheritance veſted in the Heir by Purchaſe.

Econtra. Bleſſet *verſus* Canwell. 3 Lev. 373.

It was argued for the Defendant in Error, that the Siſters were Tenants in Common in Tail general, becauſe the Words equally to be divided make a Tenancy in Common in a Will; as for Inſtance; a Deviſe to his three Sons and their Heirs, and to the longeſt Liver of them, to be equally divided between them, *&c.* adjudged this laſt Clauſe made them Tenants in Common, and here the Deviſe was to his Siſters equally between them during their Lives; and if they die leaving Iſſue or Iſſues of their Bodies, then to ſuch Iſſue or Iſſues; which Word Iſſue is as proper a Word in a Will to create an Eſtate-tail, as the Words Heirs of the Body are in a Deed, and 'tis the only Word in the Statute.

Weſtm. 2. c. 1. Anno 13 Ed. 1.

De Donis to deſcribe the Heirs of the Body, (viz.) where Lands are given to one and the Heirs of his Body, upon Condition that if he die without Iſſue, the Lands ſhall revert to the Donor, the Donee after Iſſue had Power to diſinherit the Iſſue, &c. therefore if the Word Iſſue is equivalent with the Heirs of the Body, it certainly makes an Eſtate-tail.

* 9 Rep. 127. Sonday's *Caſe.*

And ſo is * Sonday's Caſe, (viz.) A Deviſe to his Wife for Life, and after her Deceaſe to his Son William; and if he marry and hath Iſſue Male, then his Son to have it; and if he hath no Iſſue Male lawfully begotten on his Body, then to Samuel in like Manner; and if any of his Sons or their Heirs Males, Iſſue of their Bodies, go about to alien, then the next Heir to enjoy it: William ſuffered a Common Recovery, and declared the Uſes to himſelf and his Heirs; and adjudged good, becauſe he had an Eſtate-tail, for theſe Words, (viz.) If he hath no Iſſue Male, make an Eſtate-tail, which in this Caſe was farther enforced by the ſubſequent Words, (viz.) If they go about to alien, which had been impertinent if an Eſtate for Life had been intended, becauſe in ſuch Caſe they could not alien.

As to the third Point, that the Plaintiff in Error ought to recover for a Moiety, becauſe one of the Siſters, (viz.) Anne Lunsford had done no Act to prejudice him, and that the Siſters did not take by croſs Remainders; for ſuch ſhall never be raiſed by † Implication, but where there is an abſolute Neceſſity it ſhould be done.

† 2 Cro. 665. Gilbert *verſ.* Witty.

To which it was anſwered, that the Siſters took by croſs Remainders by that Clauſe, (viz.) If both his Siſters ſhould die without Iſſue, *&c.* now upon the Death of one, the Whole is veſted in the other by way of Croſs Remainder

by Implication; and that Ravenſcroft Gifford ſhall have nothing by Implication, till both the Siſters are dead without Iſſue, and without doing any Thing to bar the Remainder.

As to the firſt and third Points, the Court was very clear in Opinion, as they were upon the firſt Argument; and as to the third Point they held, that where an Eſtate is limited to the Heirs of the Body, or to the Iſſue of one upon the Deceaſe of another to whom 'tis expreſly deviſed for Life, this is an Eſtate-tail, becauſe the Law ſupervenes the Intent of the Teſtator; and this was King and Melling's Caſe. Curia.

But of late the Courts have not gone ſo far as they did formerly to ſupervene the Intent of Teſtators, as in the Caſe of Backhouſe and Wells in Chancery, in the Lord Parker's Time, which Caſe differed from that of King and Melling but in one Word, which was the Word Only; as for Inſtance; Melling's Caſe was a Deviſe to one for Life, and after his Deceaſe to the Iſſue of his Body by a ſecond Wife; this was adjudged an Eſtate-tail, and Backhouſe's Caſe was, (viz.) A Deviſe to one for Life only, and if he die without Iſſue, Remainder over; this was adjudged an Eſtate for Life, becauſe of the Word Only.

Now in the preſent Caſe, if the Word Iſſue is a Limitation, 'tis an Entail; but if 'tis by Way of Deſcription who ſhall take, 'tis but an Eſtate for Life; and here the Words are, (viz.) If the Siſters happen to die, leaving Iſſue or Iſſues of their Bodies, then in Truſt for ſuch Iſſue or Iſſues; if the Teſtator had reſted there, and gone no farther, this had been a plain Eſtate-tail; but he goes farther, and ſays, or elſe in Truſt for the Survivor or Survivors of them, which Words ſhew, that the Teſtator intended the Word Iſſue to be a Word of Purchaſe, and not of Limitation, becauſe the Word Survivors muſt relate to the Word Iſſue, for there cannot be any Survivors between Two, and therefore it could never relate to the Siſters, and this was what made the Doubt.

One of the Judges held it an Eſtate only for Life; he agreed, that the Word Iſſue in a Will, was a good Word either of Limitation or Purchaſe, and that it was the Intention of the Teſtator which made it either the one or the other; now in this Caſe it ſeemed, that by the concomitant Clauſes the Teſtator intended an Eſtate for Life to the two Siſters, and no larger an Eſtate; and therefore to conſtrue it an Eſtate-tail, would be to controul the Intention of the ſaid Teſtator.

Two Judges of Opinion, that it was an Eſtate-tail; the Chief Juſtice doubted.

The

The King *versus* Pollard. S.C. 2d Raym.

New Trial was never granted in another Term after the Signing a Judgment. Indictment against the Accessary, &c.

THE Defendant was found guilty, as Accessary to the Buying and Receiving stolen Goods; and now it was moved to set aside the Verdict, and for a new Trial, because the Principal was since tried for the same Fact, and acquitted, at the Old Baily; and where the Principal is Not guilty, the Accessary cannot be Guilty, especially in this Case, he being found Guilty upon the Evidence of the Principal.

* 5 Annæ, cap. 31.

The Statute which relates to this Matter was made * 5 Annæ, by which 'tis enacted, That it shall be lawful to prosecute Persons Buying and Receiving stolen Goods, knowing them to be stolen, as for a Misdemeanor, and to punish them by Fine and Imprisonment, tho' the principal Felon is not before convicted.

And if such principal Felon cannot be taken, yet it shall be lawful to prosecute and punish any Person knowingly buying Goods stolen by such Principal, &c.

Now, by this Statute, Power is given to prosecute the Accessary, but that is where the Principal cannot be taken; now here he was not only taken, but appeared and gave Evidence against the Accessary, therefore the Defendant moved for a new Trial.

Curia.

But it was denied, because the Judgment being signed of another Term, the Motion was not proper till it was referred to a Master to report, whether it was regular, or not; and afterwards the Master reported, that the Judgment was regular, but that it being only an interlocutory Judgment, the Defendant by the Course of the Court, and by several Precedents might move in Arrest of such Judgment in another Term; but that he never knew a Motion for a new Trial in another Term, after Judgment signed in a former Term.

But the Counsel for the Defendant insisted upon the Granting a new Trial; for the same Reason which will warrant a Motion in Arrest of Judgment, will likewise warrant the like Motion for a new Trial.

But the Court demanded of the Counsel, Whether they could shew a Motion was ever made for a new Trial, and granted at another Term after the Signing an interlocutory Judgment; and that if they could not shew that such a Motion

tion was made and granted, it should not be done in the present Case.

To which it was answered, that the Counsel on the other Side could not shew any Precedent where such Motion was made and denied; and if such a Motion was never made, the Merits of the Case must be the Guide to determine it now; for if there are not any Precedents against it, then the same Reason which will warrant a Motion in Arrest of Judgment will warrant this Motion for a new Trial.

But the Court denied a new Trial, because no Precedent could be produced, that it was ever granted in another Term after the Signing the Judgment.

Thereupon it was moved in Arrest of Judgment, for that the Indictment was ill, for the Statute which gives a Power to prosecute the Accessary, tho' the Principal is not before convicted, makes such a Prosecution lawful where the Principal Felon cannot be taken, which are the very Words of the Statute; now this Indictment should have set forth, that the Principal could not be taken, which being omitted, 'tis wrong, and consequently the Judgment should be arrested, the Indictment not pursuing the Statute, which is the Warrant in this Case.

The Statute makes the Prosecution against the Accessary lawful, where the principal Felon is not before convicted, and not only where he could not be taken; so the Objection against the Indictment was over-ruled; and in Michaelmas-Term following, the Defendant was brought up by Habeas Corpus, and had Sentence to stand in the Pillory at the Royal Exchange, and to be imprisoned for a Year. Econtra.

Jenny *versus* Heale.

Bill of Exchange not payable out of any certain Fund.

UPON a Writ of Error of a Judgment given in the Common Pleas, the Case was thus: *ff.* Anno 1720, the Plaintiff Jenny sold his Lands to the Defendant, who gave him a Bill for the Price or Value thereof in these Words directed to one Pratt, (viz.) Sir, You are to pay to Mr. *Jenny* so much, *&c.* out of the Money belonging to the Governors and Company of *Devonshire* Miners, *&c.* and the Money not being paid, the Plaintiff Jenny brought his Action in the Common Pleas upon this Note, as a Bill of Exchange; and on Demurrer the Plaintiff had Judgment.

But now the Defendant in the original Action brought a Writ of Error; and it was argued for the Plaintiff in the Action, that this is a good Bill of Exchange, for it hath all the Qualities of such a Bill, that is, it hath three Persons, the Drawer, the Payer, and the Drawee; and a set Form of Words is not necessary in Bills of Exchange, nor that it must be between Merchants; and for this the Case of * Bellasis and Hesther was cited, where the Objection was, that the Custom of Merchants was not set forth in the Declaration, but only that the Defendant and one Greevson were Persons negotiantes in Merchandize, and that Greevson drew a Bill on the Defendant, payable to the Plaintiff secundum usum Mercatorum, and this was held good; and that to set forth the Custom at large would be Surplusage, neither is it necessary to shew, that it was between Merchants.

* Lutw. 1589. Bellasis *verſ.* Hesther.

Hard. 445.

As the Drawing or Signing every Bill of Exchange implies a Consideration for so doing, so the Expressing that the Money should be paid out of any certain Fund, doth not make it worse; and though it may be objected that this is only a Direction to the Cashier to pay the Money, yet 'tis still a Bill of Exchange.

Econtra.

It was said, that this was not a good Bill of Exchange; for since the bare Signing a Bill implies a Consideration in the Person signing (who is the Drawer) which being contrary to the antient Law, the Plaintiff ought to shew, that the Defendant signed this Bill as a Bill of Exchange, or as a negotiable Bill, for the Rise and Progress of these Bills was admitted and introduced for the Ease and Accommodation of Trade.

If the Governors of the South-Sea Company, or of the Bank of England, had signed a Note in this Form, which is no more than an Appointment or Direction to their Cashier to pay Money, this would not bind them; now, the Reason why Bills of Exchange charge the Drawer is, because he hath some Consideration for Drawing the Bill; but in the present Case the Drawer had no Consideration; besides, 'tis a contingent Bill, it being payable out of the Money belonging to the Devonshire Mines; now, if the Cashier had not Money sufficient to pay and discharge this Note, and for that Reason had refused to accept it, certainly he could not be charged for Non-acceptance, because he was only to accept if he had Money belonging to the Devonshire Mines.

In all the old Bills of Exchange, the Words Value received are inserted, though now not necessary; and the Want of those Words was the only Objection insisted on in the Court of Common Pleas, on the Demurrer to the Declaration; and the Form of the Bill was not so much as mentioned.

Besides it does not appear that this Bill did relate to Trade, (though that is not necessary) but where the contrary appears, it cannot be a Bill of Exchange.

This Note is no more than a Direction or Appointment to the Cashier to pay the Money, and doth not answer the Necessity of Trade; for 'tis not negotiable as a Bill for Money, therefore it would be inconvenient to charge the Drawer; for if he might be charged on such a Note, then any Man who gives his Steward an Order or Authority to pay Money, might be charged for Non-payment. Curia.

Besides, 'tis the Substance of the Drawer which is always considered in Bills of Exchange, for 'tis that which makes them negotiable; but this new Invention of drawing Bills on Cashiers to pay Money out of Funds, makes no Difference between the best and worst Man as to his Substance.

'Tis true, there are three Persons named in this Note, of which the Cashier of the Company is one; and this is all which makes it like a Bill of Exchange, tho' there are such Bills between two Persons, as where they are made payable by themselves, for so are all Goldsmiths Notes; now if this Note had been accepted by the Cashier, and he had died without paying the Money, certainly his Executor could not be charged.

'Tis true Custom hath carried Bills of Exchange a great Way, but never so far as to make them payable out of any particular Fund; and for these Reasons the Judgment in the Common Pleas was reversed.

The King *versus The Chamberlain of* London.

UPON a Mandamus to admit George Warren to his Freedom of the Company of Merchant-Taylors in the City of London; the Chamberlain, &c. made this Return. By-Law, whether good and well returned.

If. That the Joyners of the City of London are incorporated into a Company, and that they keep a Court for the better Regulation of their Work, and for the Benefit of their Company; and that by an Act of Common Council, it

was ordered that any Person who exercises the Trade of a Joyner in that City, shall take his Freedom in that Company; and if * summoned for that Purpose, and shall refuse or neglect to take his Freedom in that Company, he may be fined for exercising such Trade, and disfranchised; and that George Warren did exercise the Trade of a † Joyner, and that the Company of Joyners were willing to admit him of their Company, but he neglected to be admitted; whereupon he was disfranchised.

* 'Tis not said that he was summoned.

† But did not say in the City of *London*.

The Question was, whether this is a good By-Law or not; and it was argued (against the Return) that it was not, because the City of London for many Ages past hath been supplied with all their Superior Officers out of the twelve great Companies, of which this of the Merchant-Taylors is one; and that Warren is free of that Company, and therefore he shall not be compelled to be free of any other.

There are but two Ways of being free, (i. e.) By Birth and by Acquisition, for every Freeman's Child is free of the same Company of which his Father was free; and if such Child should be of another Trade, certainly he would not be obliged to purchase his Freedom in another Company.

Besides this Return is ill, for 'tis that he who exercises the Trade of a Joyner in London, must take his Freedom in the Company of Joyners, if summoned for that Purpose; and 'tis not set forth that Warren was summoned.

Econtra. On the other Side it was argued that this was a good By-Law, and well returned; that it was a By-Law founded upon a Custom, and confirmed by Acts of Parliament, and made by a great Number of Citizens (in Common Council assembled) to prevent Abuses and Frauds in Trade.

And as these Guilds and Fraternities have obtained this Freedom as an Encouragement of Trade, so no Custom should be established which is detrimental to it, as this Custom would be, that a Man who is free of one Company, shall not be compelled to be free of another more suitable to his Trade and Employment.

As to the Objection against this Return, (viz.) That he who takes his Freedom in this Company, must be summoned for that Purpose; the Answer is, that such Person hath no Means to compel the Company to admit him; and if so, there is no Need of summoning him.

The Reply. It was farther argued against this By-Law, that though all the Customs of the City of London are confirmed by Act,

yet when ever an unreaſonable Cuſtom is returned, 'tis always adjudged void; now if Warren's being free of the Merchant Taylors Company did ſkreen him or his Work from the Inſpection or Inquiry of the Joyners Company, it might be reaſonable that he ſhould be admitted of that Company; but when it doth not, there can be no Manner of Inconvenience of taking his Freedom in another Company, and not in this; and ſo is the Caſe of * Robinſon and Groſcourt, which hath been already cited and unanſwered. It was thus: Robinſon v. Groſcourt. 5 Mod. 104.

ſ. An Action of Debt was brought for 10 l. forfeited upon the Breach of a By-Law; which was, that every Perſon exerciſing the Occupation of Muſick and Dancing within the City of London, who ſhall have a Privilege to be made free by Patrimony, ſhall at the next Court of Aſſiſtants of the Company of Muſicians after Notice, accept and take the Freedom of the ſaid Company, under the Penalty of 10 l. this was adjudged a void By-Law, for it hath no Cuſtom to ſupport it; 'tis true the Cuſtom was laid to be, that whoever is free of the City muſt be free of ſome Company; but that Cuſtom doth not oblige a Man to be of any particular Company, but leaves it at large to be free of ſome Company; now in this Caſe, though Groſcourt the Defendant ſhould be entitled by Birth, or by Apprenticeſhip, to be free of a Company, yet he muſt likewiſe be free of the Company of Muſicians; ſo that this By-Law exceeds the Cuſtom, and for that Reaſon it was held void; and ſo ſhould this, and for the ſame Reaſon.

The Common Council have Power to make any reaſonable By-Laws; and this in the principal Caſe ſeems to be ſuch; for it was made to prevent the Frauds in Trade, by ſubjecting a Man to the Inſpection of thoſe who underſtand the ſame Trade, (viz.) The Trade of a Joyner, which the Company of Merchant Taylors do not; but the only Queſtion which admits any Doubt is, if a Man who is free of the Merchant Taylors Company, and exerciſes the Trade of a Joyner, may be obliged to take his Freedom in the Joyners Company; for if he is not, then this By-Law is manifeſtly injurious to him, becauſe it takes away his Right of Freedom in one Company, and gives him no Right to his Freedom in another Company; but certainly a By-Law which makes it penal for a Man to exerciſe any other Trade, entitles him to his Freedom in the Company of the ſame Trade; and 'tis a reaſonable By-Law which hinders Men from exerciſing ſuch Trades, and being free of ſuch Companies, Curia.

who

who have no Knowledge in those Trades; and the Case in the 5th Mod. differs from this, because in that Case there was no Company of Dancing-Masters, of which the Defendant might be made free.

Now this By-Law being agreeable to the Constitution of the City, and not restraining Trade, but rather regulating it by subjecting several Artificers to be under the Inspection of others, who understand the same Trade, which cannot be better done, than by compelling them to take their Freedom in a Company of that Trade in which they are employed; therefore this was adjudged a reasonable By-Law.

The Freedom of the City cannot be taken from a Man, provided he will take his Freedom in a proper Company; and if that Company will not admit him, the Court will grant a Mandamus to compel them; but on this Return it appears, that every Man who exercises the Trade of a Joyner, &c. within the City of London, ought to be free of the Company of Joyners; but it doth not shew that the Defendant did exercise that Trade in the City, *&c.* but that he did exercise the Trade of a Joyner generally, without saying where, and then it might be at York or any where else; but 'tis his Exercising it within the City of London which gives them Jurisdiction; and for this Cause it was adjourned.

Ashton *versus* Blagrave.

Scandalous Words spoken of a Justice of the Peace.

IN an Action on the Case for scandalous Words spoken of a Justice of Peace, there being a Colloquium laid of the Plaintiff, and of his Office of Justice of the Peace; the Defendant spoke the following Words, (viz.) He (meaning the Plaintiff) is a Rascal, a Villain and a Lier; upon Not guilty pleaded the Plaintiff had a Verdict; and upon a Motion in Arrest of Judgment, a Rule was made that the Plaintiff should shew Cause, &c. and now it was moved for Judgment, that these Words were actionable, because they convey an Idea too mean, and very much unbecoming the Office of a Justice of Peace, and the Meaning of Words is always to be taken according to common Intendment; therefore the Calling a Man Daffi-down-dilly and Ambidexter was held actionable, though those Words import no Crime in themselves; but in common Acceptation are applied to some Crimes.

The Signification of Words is various; as for Inſtance; 'tis now actionable to call a Man Jacobite or Papiſt, but it was not ſo in a late Reign, therefore Words muſt be conſtrued to be ſcandalous, or not, according to the common Acceptation when they are ſpoken; but the Words in the principal Caſe did always import a Meaneſs and Scandal of the Perſon of whom they were ſpoken; and there is a Difference between ſpeaking of a Juſtice of the Peace, and ſpeaking of him in his Office, as ſpecially laid in this Declaration.

It was ſaid on the other Side, that theſe Words are ſo foreign to the Office of a Juſtice of the Peace, that tho' he is named, they cannot imply any Scandal to his Office, for none of them alone are actionable; the Word Raſcal is not, nor the Word Villain, unleſs ſome other Words are added, (viz.) Stay the Villain, or ſeiſe the Villain; neither is the Word Liar actionable; and if they are not actionable alone, they are not ſo when taken altogether; and the rather, becauſe they are not of any certain Signification. Econtra.

'Tis true, 'tis actionable to ſay of a Juſtice of the Peace, that he is a Coverer of Thieves, becauſe this is againſt his Oath as Juſtice of the Peace; but 'tis otherwiſe for calling him * Rogue or Harlet; and ſo 'tis to ſay he is a Vermin in the Commonwealth; neither is it actionable to call him a † Fool, an Aſs, a Coxcomb, a buffle-head Juſtice; ſo the Words in this Caſe are not actionable. Hob. 117. 4 Rep. 16. * 4 Rep. 13. Moor 141. † 1 Lev. 52. Sid. 67. Prill v. Feild.

To which it was anſwered, that a Juſtice of the Peace hath a double Capacity, and that where it doth not appear that the Words were ſpoken of him as a Juſtice, they may not bear an Action, but where they were ſpoken of him relating to his Office, they are actionable.

The Words Raſcal and Villain, ſpoken of a Juſtice of Peace, where a Colloquium was laid of his Office, import a Scandal; for tho' thoſe are Words of an incertain Signification, yet they import a mean and baſe Behaviour in the Man, but the Word Liar is as much as to ſay, the Juſtice of Peace acts unfairly in his Office; ſo taken altogether they are ſcandalous Words; and the Plaintiff had Judgment. Curia.

Reynolds

Reynolds *verſus* Clerke.

Where an Action on the Caſe, and not an Action of Treſpaſs, is the proper Action.

TReſpaſs againſt the Defendant for Entring into a Yard and fixing a Spout on his own Houſe, and thereby caſting the Water on the Plaintiff's Stable, per quod the Walls of the Stable were rotted and ſpoiled ad damnum, &c.

The Defendant pleaded Not guilty as to all, but to entring the Yard and fixing the Spout on his own Houſe; and as to that he juſtified, for that his Houſe and the Plaintiff's Stable formerly belonged to T. S. and were contiguous and in the Poſſeſſion of one Tenant, and had but one Yard, one Pump, and one Privy, which, with one Houſe, were conveyed to the Plaintiff, excepting the free Uſe of the ſaid Yard, Pump, &c. to the Tenant of the other Houſe, and that the Defendant bought the other Houſe, with the Uſe of the Yard and Pump, &c. and that he entered and was poſſeſſed, and fixed the Spout to his Houſe for the neceſſary Uſe and Preſervation thereof, by throwing the Water from the Eaves, which otherwiſe would have damaged his Houſe, and ſo juſtified the Entring and Fixing the Spout to his own Houſe.

And upon a Demurrer to this Plea it was inſiſted for the Plaintiff, that this Juſtification was not good, becauſe the Spout was a Nuſance to him; and tho' T. S. might juſtify the Fixing it to one Houſe, when both were in his Poſſeſſion, yet when both were ſold to different Perſons, * one of them cannot juſtify for a Nuſance done to the other; and in this Caſe the Defendant had neither an expreſs or an implied Power to ſet up any Spout, eſpecially when it would be a Nuſance to the Plaintiff.

* Hob. 131.

The Uſe of this Yard reſerved to the Defendant, is no more than an Eaſement to his Houſe, and not to be uſed to any other Purpoſe; and the Nature of a Nuſance is ſuch, that if it be of Neceſſity, (i. e.) If 'tis neceſſary or beneficial to him who made it, and another buys the Land in which the Nuſance was made, in ſuch Caſe the Nuſance is purged; and if afterwards the Lands come into different Hands, 'tis not abatable; but if 'tis an unneceſſary Nuſance, 'tis only a Suſpenſion thereof when in one Hand, and afterwards coming into different Hands, 'tis abatable.

But there are ſome Privileges ſo very neceſſary as not to be extinguiſhed by Unity of Poſſeſſion, as Paths to a Mill, &c. for they ſhall revive as ſoon as the Tenements come to

different Hands again; now, in this Case the Defendant having erected this Nusance after the Tenements came to different Hands, there can be no Colour for him to justify.

Econtra. The Counsel for the Defendant took no Notice of the Objection made on the other Side, but insisted, that the Plaintiff was mistaken in this Action, because Trespass would not lie for firing a Spout on his own House; but that if the Plaintiff had any Damage thereby, he ought to bring an Action on the Case to recover what he was damnified, for he had a License to enter the Yard, and could not be a Trespasser for Entring and Firing the Spout on his own House.

Besides, the Defendant hath averred in this Plea, that the Firing this Spout is for the necessary Use of his House, which the Plaintiff hath confessed by the Demurrer; therefore when he justified the Entring into the Yard, the Consequence thereof cannot be a Trespass.

The Reply for the Plaintiff. 'Tis now insisted on by the Defendant, that the Plaintiff hath mistaken his Action, but not the Defendant's Innocence, and that an Action on the Case is the proper Action for the Plaintiff, which is very true, and so is a Quod permittat; but yet Trespass is likewise a proper Action; for it cannot be denied, but that the Freehold and Inheritance of this Yard is in the Plaintiff, and that the Defendant hath only the bare Use of it, and by Misusing it he is a Trespasser.

'Tis true likewise, that the Defendant had License to enter the Yard, but every License must have a reasonable Construction; for can it ever be intended, that because he had Leave to enter the Yard, and had the Use thereof, that he might justify the throwing down the Plaintiff's House?

Curia. Upon the first arguing this Case, the Chief Justice said this License was granted by special Words, so could not be so extensive as otherwise it would have been; for the Case is no more than a Grant of the House and Yard; and to except the Yard would be void as to the Freehold; therefore the Exception must be intended to some particular Purpose as to the Use thereof, to walk in, or to go to the Pump, and in such Case he is to do no Damage to the Freehold; and if this License is in any Manner misused, to the Prejudice of him who hath the Freehold; he who misuseth it is a Trespasser, as if he dig up the Yard, &c. but the Use which was made of it in this Case, was to enter and fix a Spout to his own House; now, tho' the original Act was lawful, as done to his own House, yet he may be a Trespasser, when the immediate Consequence of such an Act is injurious to his Neighbour;

for ſuppoſe a Man hath a Water-courſe running thro' his Ground, and his Neighbour diverts it, this is no Treſpaſs, but if by diverting it, he turned it on his Neighbour's Houſe, it would be a Treſpaſs.

For which Reaſon the Chief Juſtice and another Judge held this Action of Treſpaſs was a proper Action.

Two other Judges were of a contrary Opinion, for that the Treſpaſs was laid for entring the Yard, and fixing a Spout to his own Houſe, the reſt being laid as an Aggravation of the Damages; now an Action of Treſpaſs is a poſſeſſory Action, and for ſome Injury done to a Man's Poſſeſſion; and the genuine and natural Difference between Treſpaſs and Caſe is, (viz.) That a Treſpaſs is a wrongful Act in it ſelf, but an Action on the Caſe is for a Remedy of an Injury ſuffered in Conſequence of an Act in it ſelf lawful; as where a Man ſhoots in his own Ground, and by ſuch Shooting frights the Ducks from his Neighbour's Decoy; and certainly it cannot be denied, but that the Entring the Yard and fixing the Spout to his own Houſe, are lawful Acts in themſelves; and if the Conſequence thereof was prejudicial to the Plaintiff, an Action on the Caſe is the proper Remedy, and not an Action of Treſpaſs.

Afterwards this Point was argued again, the Queſtion being, if Treſpaſs lies for Entring this Yard, and ſetting a Spout on his own Houſe; and it was argued, that it did not, but that an Action on the Caſe was the proper Remedy; it was admitted, that where the original Act is a Wrong actually done, in ſuch Caſe Treſpaſs lies, but where the original Act was lawful, and conſequential Damages enſue, there an Action on the Caſe is the proper Remedy.

The Complaint againſt the Defendant is for a Nonfeaſance, (viz.) For that he did not take Care that this Spout ſhould not damnify the Plaintiff's Houſe; and 'tis certain that Treſpaſs will not lie for a Nonfeaſance; if the Defendant had undertaken to cure the Plaintiff's Horſe, and by his Negligence the Horſe had died, yet Treſpaſs would not lie againſt him, tho' the Horſe was the Property of another Man; but in this Caſe the Houſe was his Own.

Edwards *ver.* Hallender. Poph. 46. Cro. Eliz. 285. S. C. 2 Leon. S. C.

The Caſe of Edwards and Hallender is full in Point, which was thus: The Plaintiff had a Cellar, and the Defendant had a Warehouſe over that Cellar, on which he laid ſo great a Burthen, that the Floor broke and fell into the Cellar and ſpoiled three Buts of Wine: Adjudged, that an Action on the Caſe, and not an Action of Treſpaſs lay againſt the Defendant.

It was argued for the Plaintiff that Treſpaſs is the proper Action; for though it was lawful for the Defendant to fix the Spout on his own Houſe, yet he ought not to do it in ſuch a Manner, ſo as immediately to treſpaſs his Neighbour; like the Caſe of Preſton *verſus* Mercer, which was Treſpaſs Vi & armis for cauſing ſtinking Water in his Yard to run to the Walls of the Plaintiff's Houſe, and piercing them, ſo that it run into his Cellar; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment that Treſpaſs Vi & armis would not lie againſt the Defendant, becauſe a Man cannot be a Treſpaſſer with Force and Arms in his own Ground, he ought to bring an Action on the Caſe; but Judgment was given for the Plaintiff. *Econtra* for the Plaintiff. Preſton *verſ.* Mercer. Hardres 60.

To which it was anſwered, that the Original Act was a Wrong done, (viz.) by cauſing ſtinking Water to run to the Walls of the Plaintiff's Houſe; which differs from the principal Caſe, and ſo is no Authority for the Plaintiff.

The Bounds of Actions muſt be obſerved, and all the Books ſhew that there is a great Difference between an Action of Treſpaſs Vi & armis, and Treſpaſs on the Caſe; for the one lies where the Original Act was a Wrong in it ſelf, and the other where Damages are conſequential to a lawful Act; as for Inſtance, 'tis lawful for a Man to make a Dam on his own Ground; but if by making it, the Water overflows his Neighbour's Ground, an Action on the Caſe lies againſt him. Curia.

The Civilians call Treſpaſſes on the Caſe Actiones injuriarum; and in the principal Caſe an Injury was done by Conſequence of a lawful Act; therefore this Action being founded on a Damage reſulting from ſuch Act, is the proper Action for the Plaintiff in this Caſe, and not an Action of Treſpaſs.

Judgment for the Defendant.

Waddy *verſus* Newton.

UPON a ſpecial Verdict in Ejectment, the Caſe was thus:

ſi. Tenants in Tail covenanted to levy a Fine, and ſuffer a Common Recovery of the Lands now in Queſtion, and of a Fiſhery; and accordingly levied the Fine thereof, by the Name of 120 Acres of Land in Stockwell-Hall, in the County of, &c. and of 10 Acres aqua cooperta; and declared the Uſe thereof to himſelf and his Heirs. Where the Acres mentioned in a Fine or Common Recovery ſhall be taken by Computation, and not by the Statute *De terris menſurandis.*

But there being many more than 140 Acres Statute Measure, the Defendant who was Heir in Tail would contest the Right to all above those 140 Acres; and thereupon the Plaintiff brought an Ejectment, and suggested that the whole Estate was computed to be 140 Acres by the common Computation in the Country, &c. and upon Not guilty pleaded the Jury found a special Verdict, (viz.) they found the Fine was levied, and the Recovery was suffered by the Name of 120 Acres of Land, and of 10 Acres aqua cooperta; and that the whole Estate entailed was computed in the Country to be 140 Acres of Land.

For the Plaintiff. It was insisted for the Plaintiff, that all the entailed Lands were comprised in this Fine, by the Name of 140 Acres of Land; and this by the Intent of the Tenant in Tail who levied the Fine; that Computations are to be ascertained by a Jury, according to how much 'tis reputed to be in the Country, where Computations are made, and that they are tied down to the very Country where the Things are transacted; therefore where an Habere facias possessionem is directed to the Sheriff to put a Man in Possession of 20 Acres, he must deliver 20 Acres to him according to the Usage of the Country where the Lands lie.

Thynn *vers.* Thynn. 1 Vent. 51. S. C. 1 Lev. 27. S. C. Sid. 190. S. C. 1 Mod. 25. S. C. 2 Mod. 239. S. C. So where Tenant in Tail of the Manor of Lavington, and of two Closes reputed Parcel thereof, levied a Fine, and suffered a Recovery of the Manor, with the Appurtenance; now tho' the two Closes were only Parcel of the Manor in Reputation, yet they were adjudged to pass, because it was intended by the Parties that they should pass.

* 2 Inst. 42. The Fishery likewise passes by the Name of 10 Acres aqua cooperta; for 'tis demandable by that Name in a Præcipe, which is a real Action, and so 'tis in an *Assise; and if a real Action will lie for it, certainly an Ejectment will.

Econtra for the Defendant. 'Tis not pretended that this Computation is the common Way of Measure of Lands by the Custom of the County or Hundred, but only by the Custom of Stockwell-Hall, in the County of, &c. and it will be very difficult to know how far that extends; so there being no Manner of Certainty to fix the Custom, the Plaintiff can never get over the Statute † 34 Ed. 1. † de mensurandis terris; but that the Court will judge of the Number of Acres comprised in this Fine and Recovery, according to that Statute, as a certain Rule to direct their Judgment.

Now by that Statute, an Acre of Land containing ten Perches in Length, muſt be ſixteen Perches in Breadth, and ſo on; therefore theſe 140 Acres compriſed in this Fine, muſt be according to that Meaſure, and not left to an incertain Computation; and there is a Difference between a Manor which is fixed to no certain Meaſure, and a Quantity of Acres where the Meaſure is aſcertained by the Statute.

'Tis true, if it was the Cuſtom of the County or of the Hundred, ſo as it was limited or fixed to a certain Place; this Method of Computation might be good; as the Acres in Cornwall, or a Pearch in Staffordſhire; becauſe the publick Uſage of the County gives it a Sanction; and there are ſome * Law Books which prove that the Meaſure in thoſe Counties is different from all other Places in England; and ſo are the Prices of the Things meaſured.

* Crompt. Juriſ. 222.

But in the preſent Caſe, the Acres if taken by Computation, are two Fifths larger than the Common or Statute Meaſure, without confirming ſuch Computation to any certain Place; and in all the Caſes wherein 'tis mentioned, what paſſed by ſuffering a Recovery of a Manor in Reputation, 'tis alledged in the Deed, that the Covenantor is to ſuffer a Recovery of a reputed Manor; but 'tis not ſet forth in this Deed that the Covenantor was to ſuffer a Common Recovery of ſo many Acres in Reputation; but only of 140 Acres generally.

Beſides there is a Difference between a Fine levied and a Recovery ſuffered, in Purſuance of a Contract for a valuable Conſideration, and a voluntary Fine and Recovery as this is; for in the one Caſe, the prior Agreement governs the Whole; but where there is no ſuch Agreement, the ordinary Courſe of Law is to be the Guide, and no ſtrained Conſtruction ſhall be deduced from the Intention of the Parties.

And 'tis to be obſerved, that the Statute De terris menſurandis was made on Purpoſe to aſcertain the Fine due to the King, by Alienation of Lands by Fines, and therefore ſuch a looſe Computation of the Number of Acres, ſhall not avoid the Deſign of this Statute; and if ſo, then where a Man covenants to levy a Fine of 500 Acres of Land, certainly it muſt be intended Statute Acres.

As to the Fiſhery, the Plaintiff hath no Colour to have Judgment, becauſe an Ejectment will not lie of a Fiſhery, nor in any Caſe but where there may be an Entry and Expulſion; and that cannot be of a Fiſhery, eſpecially in this Caſe where

Ejectment will not lie of a Fiſhery.

where it was of a Fiſhery in the River Tyne, which cannot paſs by the Name of ſo many Acres aqua cooperta, becauſe 'tis not like a Pond where the very Soil is the Property of another; but this is only a Freedom to fiſh in that River.

Curia. 'Tis admitted by the Counſel for the Defendant, that if this Fine had been levied, and Recovery ſuffered, in Purſuance of a former Agreement or Covenant for a valuable Conſideration; and if it had appeared to be the Intent of the Parties to paſs the whole Eſtate by the Name of 140 Acres, in ſuch Caſe the Whole would paſs.

Now here the Jury hath found that the whole Eſtate entailed, was computed in the County to be 140 Acres; and it will be Difficult to apprehend a Difference between a Covenant for a valuable Conſideration, and a voluntary Covenant; for it cannot reaſonably be ſaid, that the ſame Words ſhall paſs all the Lands in one Caſe, and ſhall not paſs the Whole in the other Caſe, eſpecially when the Tenant had it in his Power of paſſing it as he pleaſed.

* Cro Car. 492. Herbert v. Langbane. It will not lie *de piſcaria* in ſuch a River, becauſe 'tis only a Profit *apprendre*; but it will lie *de terra aqua cooperta.*

But they held that an Ejectment would not lie of a * Fiſhery; ſo the Defendant muſt have Judgment as to that Matter; but becauſe the Chief Juſtice who tried this Cauſe, did believe that the Defendant was ſurpriſed by the Finding of the Jury, that the whole Eſtate-tail was computed in the Country to be 140 Acres; they would not tie him down to this Verdict, but admit him to bring a new Ejectment to try the Truth of that Matter, and that they would conſider of the Judgment till next Term; but recommended it to the Parties to agree in the mean Time.

Serle *verſus* Barrington. S.C. 2 Raymond 1370.

THIS was an Action of Debt brought by an Adminiſtratrix upon an old Bond for Money due to the Inteſtate; and upon Oyer of the Bond, and the Condition thereof, it appeared to be dated Anno 9 Willi. (which was thirty-five Years paſt) and thereupon the Defendant pleaded Solvit ad diem; upon which they were at Iſſue; and at the Trial the Defendant offered to prove the Iſſue by Preſumption, (i. e.) this being a Bond of more than twenty Years ſtanding, and no Intereſt being paid in all that Time, it muſt be preſumed that the Principal was paid on the Day.

6 Mod. 22.

Now

Stra. 652 Mordaunt & Bennet — Stra. 857 Bulſtr. Ni. pri. 174.

Now to encounter this Presumption, the Plaintiff offered to give another Presumption in Evidence, and that was an Indorsement of the Payment of Interest for one Year after the Bond was nine Years old, which Indorsement was written with the Intestate's own Hand; and whether that should be given in Evidence at the Trial, was the Question; and the Chief Justice, before whom the Cause was to be tried, would not admit it to be given in Evidence, because of the Inconvenience which might ensue; for this Indorsement being all of the Intestate's Hand-writing, might be made at one Time and dated at another, and very considerably antedated; and that it might be of dangerous Consequence to admit an Indorsement made by the Intestate himself to be given in Evidence for him to support this Bond, and thereupon the Plaintiff was nonsuited; and the Chief Justice ordered, that this Matter should be referred by Way of a Case stated for the Opinion of the Court.

And now it was argued for the Plaintiff, that tho' 'tis a general Rule, no Man can be Evidence in his own Cause, yet where the Necessity of the Case requires it, he shall be an Evidence, as on the Statute of Winton, where the Person robbed is allowed to be Evidence for himself to prove the Robbery; so where a Servant is admitted to be Evidence to prove the Delivery of his Master's Goods to a Carrier, tho' at the same Time he swears to discharge himself; and this is from the Necessity in such Cases, because probably there may be no other Evidence to prove those Facts.

Besides, in this Case, the Indorsement being of the Intestate's Hand-writing should rather be given in Evidence, because 'tis to prove Money paid in Discharge of what was owing by the Defendant; and it would be very hard to require any other Proof, because none can be had of such Transactions, but his own Indorsement; and the Allowing it to be given in Evidence is not an Admitting it to be a sufficient Proof for the Jury to find for the Plaintiff, but to let it have its due Weight, that they may consider upon the whole Merits.

It was insisted for the Defendant, that this should not be given in Evidence, for if it should, it will be in the Power of any Man who can get an old Bond into his Possession, to charge the Obligor again (after the Money paid) by making such an Indorsement; and it would be as unreasonable and as inconvenient to put the Defendant to prove the Money paid after so long a Time of Acquiescence, as it would be to put

Econtra.

put the Plaintiff to prove an actual Payment of the Interest thus indorsed.

Curia. Two Judges were of Opinion, that this Case ought to be judicially brought into Court by Demurrer, or by some other proper Method; for the Plaintiff being nonsuited, there is no Cause now in Court; and so whatever Judgment is given will be extrajudicial; and because such Judgment will not determine the Case, they at first were unwilling to give any Judgment.

But afterwards those two Judges said, that the Question was, Whether this was a true Indorsement, or not; and because the Court cannot determine that Matter, it was proper for a Jury who can.

'Tis true, the Indorsement made by the Obligee charges himself, but if the Obligor should get the Bond into his Possession, he may make as many Indorsements as he will, and by that Means wrong the Obligee of all the Interest; and they were of Opinion, that this Indorsement might be admitted in Evidence, for 'tis the daily Practice to make such Indorsements on Bonds, and generally at the Request of the Obligor; and this is the best and surest Evidence of the Payment of the Money, because Acquittances and Notes may be lost, whereas Indorsements will continue as so many Brands on the Bond into whose Hands soever it falls, as long as the original Lien which creates the Charge shall continue.

But the Chief Justice being of a contrary Opinion, desired that some Precedents might be shewn where such Indorsements were given in Evidence; and thereupon it was adjourned.

Manning *versus* Turner.

Judgment against the Bail set aside upon the Surrender of the Principal.

IT was moved to set aside a Judgment against the Bail, for that the Principal surrendered himself the 2d Day of May, and seven Days afterwards gave Notice thereof to the Attorney for the Plaintiff, that he had surrendered himself on that Day before Justice Tracy, and two Days afterwards he gave Notice that he had surrendered himself before Justice Powys, and all this before the Return of the second Scire facias.

Econtra. It was said on the other Side, that tho' Notice was given to the Attorney, yet by the express Rule of this Court, the Bail are not discharged until the Bail-piece is marked, which was not done until after the Return of the second Scire facias;

facias; 'tis true, there is an Exoneretur entered now, but that was after the Signing the Judgment.

To which it was replied, that admitting the Fact to be as before-mentioned, yet the Judgment ought to be set aside, because the Plaintiff's Attorney took the Bail-piece from the Judge's Chamber, but did not leave it with the proper Officer; but as soon as it was left with him, the Attorney for the Defendant entered an Exoneretur, so that it was the Plaintiff's Fault that it was not entered sooner.

This Matter being referred to the Master, he reported, that the Principal surrendered himself on the second Day of May, and Notice was given to the Plaintiff's Attorney, that the Surrender was before Justice Tracy on the seventh Day of May, and two Days afterwards, that it was before Justice Powys, and the Bail-piece was discharged on the Fourth of the same Month, and that the second Scire facias was returnable on the ninth Day of May, and that the Plaintiff's Attorney took the Bail-piece from the Judge's Chamber and kept it for a considerable Time; and that there was not fifteen Days between the Teste and Return of the second Scire facias; neither was it four Days in the Office; and upon this Report the Judgment was set aside.

Wild *versus* Harding.

A Rule was made to discharge the Bail, on a Pretence that the Principal had surrendered himself before the Return of the second Scire facias against the Bail; and now it was moved to discharge that Rule for two Reasons, (viz.) For that if there was any such Surrender, the Plaintiff's Attorney had no Notice of it; and if there had been Notice, the Defendant's Attorney should have brought the Bail-piece before the Master to have it discharged, otherwise 'tis no Surrender by the express Rule of this Court; and neither of these Things being done, the Surrender is not regular, and therefore the Bail are not discharged, there being no Exoneretur entered on the Bail-piece, not that the Plaintiff owned the Surrender was made in Time.

Bail are not discharged upon the Surrender of the Principal, unless an *Exoneretur* is entered on the Bail-piece.

'Tis the Practice of the Court, that the Bail are not discharged without Entring an Exoneretur on the Bail-piece, on Notice given of the Surrender; but if the Defendants did not give Notice, 'tis an Irregularity which will not be supplied by the Court without paying Costs; but if the Bail surrendered

Curia.

rendered the Principal fairly, tho' not ſtrictly regular, they ought to be favoured, and are indulged by the Court to ſurrender him at any Time before the Return of the ſecond Scire facias; now the Queſtion in this Caſe was, Whether the Principal did ſurrender himſelf before ſuch Return, and the beſt Evidence of that Matter is the Bail-piece; but if he did ſurrender himſelf, and gave Notice, he ought to pay Coſts until the Bail-piece was marked; for he is to take Notice of that, (viz.) Of the Exoneretur, and not of what the Attorney for the Defendant told him.

Goddard *verſus* Gilman.

Where a *Fi. fa.* without a *Teſtatum* is not good.

THE Plaintiff brought an Action of Debt in London, and had Judgment, and ſued out a Fieri facias directed to the Sheriff, without a Teſtatum fieri facias into London, by Virtue whereof the Defendant's Goods were taken in Execution in Middleſex; and becauſe this was done by an original Fieri facias without a Teſtatum, the Execution was ſet aſide as irregular.

And now the Plaintiff moved, that he having a Judgment with a Releaſe of Errors, that the Goods might remain in the Sheriff's Hands, and not be delivered to the Defendant, who was a poor Man, for by that Means the Plaintiff would loſe his Debt.

Curia. When the Execution is ſet aſide (as it was in this Caſe) the Goods taken muſt be returned, becauſe there can be no Colour for the Sheriff to detain them.

The like Rule was made in Michaelmas-Term following, in the Caſe of White *verſus* Cornwall, where an Action was laid in one County, and the Plaintiff had Judgment, and took out a Fieri facias directed to a Sheriff of another County, without a Teſtatum, &c. afterwards, the Plaintiff's Attorney perceiving this Miſtake, ſued out a Teſtatum fieri facias into that County; but before it came to the Sheriff he had executed the firſt Writ, and afterwards he executed the other Writ; but the Execution was ſet aſide, becauſe the firſt Writ being executed, the Sheriff could not regularly execute the other.

Fry *verſus* Carne.

IN an Action on the Caſe for theſe ſcandalous Words, (viz.) Fry (the Plaintiff) had the Pretender's Picture in his Room, and I ſaw him drink his Health, and he ſaid that he (the Pretender) had a Right to the Crown; it was moved in Arreſt of Judgment, that theſe Words were not actionable; but the Court would not ſuffer the Defendant's Counſel to inſiſt on it, for that they all held the Words were actionable, and ſo the Plaintiff had his Judgment.

Words where actionable.

The King *verſus Sir* Charles Holloway.

THE Court was moved for Leave to file an Information againſt the Defendant, who was about 15 Years old, and a Scholar at Wincheſter School; and it was for aſſaulting, beating and challenging one Eyres a Clergyman, who was then ſecond Maſter of that School, for no other Cauſe but that the ſaid School-maſter removed the Defendant for ſomething done at School.

A Rule was made for the Defendant to ſhew Cauſe.

Information againſt a School-Boy for aſſaulting his Maſter.

Smith *verſus* Graham.

THE like Rule was made upon a Motion for an Attachment againſt one Chaſe a Bailiff, for taking inſufficient Bail, upon the Arreſt of one (at the Plaintiff's Suit) on a Bill of Middleſex.

Attachment againſt a Bailiff for taking inſufficient Bail.

Martin *verſus* Budgell. *This Caſe was argued in* Trinity-Term, *and again in* Eaſter-Term *following.*

THIS was a Motion for Leave to file a Bill to warrant the Proceedings in this Court after a Writ of Error brought in Parliament, and the Want of a Bill aſſigned for Error; and upon a Certiorari directed to the Chief Juſtice, he certified to the Houſe of Lords, that there was no Bill filed in Hillary-Term; therefore it was now moved to file a

Want of a Bill filed was aſſigned for Error; and the Chief Juſtice certified, that no Bill was filed in that Term; it ſhall not be filed in another Term.

Bill as of another Term; and a Rule was made to move the House of Lords for another Certiorari; and the House ordered, that the Plaintiff should have Leave to bring another Certiorari to certify a Bill filed of another Term; and now this Court was moved, that the Plaintiff might have Leave to file a Bill, as of that other Term, (viz.) as of Michaelmas-Term, and to enter Continuances to warrant the Proceedings; the like having been done in the Case of Walmsley *versus* Cerey, where in the Common Pleas the Memorandum was allowed to be mended, and set right by the Bill, it being to affirm the Judgment of this Court, which had been affirmed on a Writ of Error in the Exchequer-Chamber.

Now in the principal Case a Writ of Error was brought in the House of Lords, after a Bill exhibited in Chancery for Relief, and that Bill dismissed on hearing the Cause; for which Reason this Court ought to do any Thing in their Power to support this Judgment, especially since the Merits are entirely against the Plaintiff in Error, otherwise he would have been relieved in Equity.

Econtra. This Motion is improper, because the Want of a Bill filed in such a Term, was assigned for Error in the House of Lords, and that Want was certified as of that Term by the Chief Justice; therefore a Bill of any other Term will not warrant this Proceeding; for the Memorandum in this Declaration refers to a Bill of Hillary-Term, which cannot be warranted by a Bill of another Term, and by entring Continuances; and though the Judgments in the Common Pleas are supported by Originals of former Terms by entring Continuances, it doth not follow that the like may be done in this Court; for in the Common Pleas, the Memorandum in the Declaration is always general, without referring to any certain Term, as thus Alias prout patet termino paschæ, &c. but in this Court it recites, that the Bill was of such a Term, (viz.) Memorandum quod alias scilicet termino sancti Michaelis (the Plaintiff) protulit quandam Billam suam; now if there was no Bill of that Term, and the Plaintiff should get Judgment, it ought to be reversed for that Reason.

Besides, where the Want of a Bill is assigned for Error, the Court may indulge the Plaintiff so far, as to give him Leave to file one; but never after the Chief Justice hath certified the Want of a Bill of that Term.

This being a Judgment upon a Demurrer, the Want of a Bill is certainly assignable for Error, and 'tis a good

Cauſe to reverſe a Judgment; and this appears by the * Statute made for the Amendment of the Law; by which 'tis enacted, that all the Statutes of Jeofails ſhall extend to Judgments by Confeſſion, Nil dicit, &c. and no ſuch Judgment ſhall be reverſed, ſo as an Original Writ or Bill is filed; which imports, that if no Bill is filed, the Judgment ſhall be reverſed. * 4 & 5 Annæ, c. 16.

Now if the Plaintiff might have Leave to file Originals and Bills at any Time, 'tis in vain to aſſign the Want of them for Error; but 'tis plain this cannot be done at any Time, becauſe the Philizers will not make them out after two Terms, without Application to the Chancery; and then 'tis allowed upon ſome equitable Circumſtances, but not otherwiſe.

And the Court ſeemed to be of Opinion, that this Motion was improper after the Want of a Bill filed in that Term was certified by the Chief Juſtice. Curia.

The King *verſus Pariſhioners of* St. John, *&c.*

THE Caſe: ſ. Two Children were removed, by the Order of two Juſtices, from the Pariſh of St. John to the Pariſh of St. James, *&c.* for that their Father was born in that Pariſh, which the two Juſtices apprehended to make a Settlement of the Children; but upon an Appeal to the Seſſions, this Order was quaſhed; for that it appeared the Father worked ſeveral Years in the Pariſh of St. John, and was afterwards bound Apprentice to one living there, but always lay in the Pariſh of St. James's, and had his Meat, Drink and Lodging there, except in Fair Time by Agreement; but the Court held, that he gained a Settlement in St. John's Pariſh by the Apprenticeſhip. Apprenticeſhip makes a Settlement.

The King *verſus* Cracker.

THIS was a Motion for a Rule on the Under-Sheriff of Cornwall, to execute a Capias pro fine impoſed on the Defendant Cracker; and that he might make the Return immediately, and attend with it in Court, or otherwiſe ſhew Cauſe why he hath not executed it. The Defendant was found guilty upon an Information, in Nature of a *Quo Warranto*, for uſurping the Office of Mayor, and fined.

This Cracker was found guilty upon an Information in Nature of a Quo Warranto, for uſurping the Office of Mayor of

of Tregeny in Cornwall for ſeveral Years ſucceſſively; and now a Rule was made that the Sheriff ſhould return this Writ within ten Days, or ſhew Cauſe why an Attachment ſhould not go againſt him.

But the Sheriff brought Cracker in on the Day the Writ was returnable, and he was committed to the King's Bench Priſon, till the Court ſhould conſider what Fine to ſet on him, which was ſuſpended until the Term following; and a Rule was made, that he ſhould be carried down to Tregeny, at the next Election-Day for a Mayor, in order to proceed to an Election, which was done; and upon a Mandamus directed to him for that Purpoſe, (viz.) to elect and ſwear a new Mayor, he returned that T. S. was duly elected Mayor, and that he was willing to ſwear him into that Office.

But he having miſbehaved himſelf in this Election, there being no more than two who voted for the new Mayor, who was unwilling to take the Office upon himſelf, leaſt he ſhould be proſecuted upon an Information for uſurping the Office, he refuſed to be ſworn; ſo this Cracker continued Mayor ſtill, having been Mayor, though he was ſix Months in Priſon; and for this Miſbehaviour he was found guilty, and fined 200 l. and to ſtand committed till he paid it.

The King *verſus* Pyke.

Information not granted where there hath been a peaceable Poſſeſſion of Burgeſs-ſhip for 14 Years.

A Rule was made for the Defendant Pyke, and one Prideaux, to ſhew Cauſe by what Authority they claimed to be capital Burgeſſes of the Corporation of, &c. and another Rule for an Information in Nature of a Quo Warranto againſt this Pyke and one Harriſon, (the two contending Mayors) to ſhew Cauſe by what Authority they claim, being Mayors of the Corporation, &c. and it was now moved to make both theſe Rules abſolute.

'Tis true, the Defendants have ſworn that they have been 14 Years in Poſſeſſion of the capital Burgeſs-ſhip, under a pretended Election of them into that Office; but ſince the Election of a Mayor very much depends on their being duly elected Burgeſſes, it was inſiſted that the Court would grant this Information, as they did in the Caſe of the Corporation of Penrin, notwithſtanding a long Acquieſcence.

The Objection in this Case is not like that in the Case of the Corporation of Penryn, because here was fourteen Years peaceable and uninterrupted Possession, therefore the Rule was discharged as to them, and that no Information should be granted, but that the Rule should stand against Pyke and Harrison, the contending Mayors. Econtra.

And an Information in Nature of a Quo Warranto being granted against them, it was said, that upon the Trial of that Information, and if the Court should deny to grant an Information against the capital Burgesses, they will contend that the Prosecutor cannot give any Disability of Theirs in Evidence, and therefore would be good Witnesses against him.

To which it was answered by the Court, that the Right of a Man shall not be tried in any collateral Action to which he is not a Party, therefore the Disability of Prideaux cannot be given in Evidence on the Trial of this Issue; so the Rule against him as capital Burgess was discharged.

The King *versus The Parishioners of* Wilby.

Where the Husband gained a Settlement by the Marriage of his Wife.

UPON a Motion to quash an Order of Settlement made by two Justices, and which was confirmed upon an Appeal to the Sessions, the Case appeared to be thus, (viz.) One Humphry Carr, about thirty Years last past, built a Cottage in the Parish of B. on the Waste of a Manor belonging to the Earl of Pembroke, but without any License or Order so to do, and he enjoyed the same during his Life, without any other Right, and then died, leaving Issue Elizabeth his only Daughter and Heir, who intermarried with John Darby, who with his Wife Elizabeth, being seised of this Cottage, sold it to John Willy for 30 l. and now the Question was, Whether this Marriage had gained a Settlement of John Darby the Husband.

It was insisted that it had not, because the Father of Elizabeth, the Wife of this Darby, had no Settlement there, for his Entry was by Disseisin, which gains no Settlement; and if the Father had none, his Daughter could not have any Settlement there.

But the Court were of another Opinion, because thirty Years Possession is a good Title against the Lord of the Manor, by Virtue of the Statute of Limitations, if he should bring an Ejectment to recover the Possession. Curia.

Besides,

Beſides, Elizabeth, the Wife of this Darby, and Daughter and Heir of Humphry Carr, was in Poſſeſſion by Deſcent, which is a good Title againſt any Eſcheat the Lord might have at Common Law, and therefore her Husband gained a Settlement by this Marriage.

Croſſe *verſus* Talbott.

Arreſt of a Servant of an Ambaſſador ſet aſide.

UPON a Motion to ſet aſide an Arreſt, and a Bail-Bond given by the Plaintiff, who was a Domeſtick of the Duke of Holſtein, reſident here; and this upon the Statute * 7 Annæ, by which 'tis enacted, That all the Proceſs whereby the Perſon of any Ambaſſador, or other Publick Miniſter, or of his Servants, may be detained, or his or their Goods diſtrained, ſhall be adjudged void; but the Servant of an Ambaſſador, *&c.* ſhall not have this Privilege, unleſs his Name is regiſtred in the Secretary's Office, and tranſmitted to the Sheriff of *London* and *Middleſex*, who, upon Receipt thereof muſt hang it up in ſome publick Place in their Office; all which was done in this Caſe, and thereupon the Arreſt was ſet aſide, and the Bail-Bond was vacated.

* 7 Annæ, cap. 12.

Seviniack *verſus* Marſhall.

Plea by an Adminiſtratrix, nor good.

THIS was an Action brought againſt an Adminiſtratrix, who pleaded, that ſhe had not Aſſets die impetrationis Brevis Originalis, when the Action was brought by Bill and not by Original; and for this Cauſe the Plaintiff demurred, and had Judgment.

The King *verſus* Smart.

The Eſtreating a Recognizance was ſtayed, for that the Defendant could not get his Witneſſes, who were ſick.

UPON a Certiorari to remove an Indictment, the Defendant entered into a Recognizance to try it at the next Aſſiſes, which he could not do by Reaſon of the Indiſpoſition of ſome Witneſſes; and this appearing to the Court upon Affidavit, it was moved to ſtay the Eſtreating of the Recognizance, which was granted upon Payment of Coſts, and entring into a Rule to try it at the next Aſſiſes following, eſpecially ſince the Proſecutor can get nothing by the Eſtreat of the Recognizance, but now he gets his Coſts.

Paterſon *verſus* Dyer.

A Declaration was delivered in Michaelmas-Term, and Rules given for Pleading according to the Courſe of the Court, but the Defendant making Default, the Plaintiff's Attorney ſigned Judgment, and gave due Notice of executing a Writ of Inquiry; the Defendant appeared at the Time and Place and made Defence, but ſome Time afterwards he would impeach the Judgment, but it was not allowed, becauſe he had made Defence at the Executing the Writ of Inquiry.

A Judgment by Default ſhall not be impeached where the Defendant made Defence upon the Writ of Inquiry.

Anonymus.

THE Defendant had Leave to plead de novo within four Days, within which Time he ought to have pleaded in Chief; but inſtead of that he pleaded an Outlawry of the Plaintiff in Diſability, &c. and thereupon the Plaintiff ſigned Judgment for Want of a Plea in Chief within the four Days, and this was held regular; but upon Payment of Coſts, and giving the Plaintiff Judgment in Debt for his Security, and bringing 20 l. into Court, and Pleading to Iſſue immediately, the Judgment was ſet aſide.

Where the Defendant ought to plead in Chief.

The King *verſus* Purſell.

THE Defendant being proſecuted for oppreſſing an honeſt Man, under Colour of a Warrant of the Chief Juſtice, was ordered to anſwer upon Interrogatories; and upon his Examination he forſwore himſelf, and was indicted and convicted of Perjury; and now he moved to ſet aſide the ſaid Conviction, it appearing upon Affidavit he could not be ready to make any Defence at the Trial; and upon this Motion the Verdict was ſet aſide upon Payment of Coſts, and Entring into a Rule to try it forthwith.

The Defendant was convicted of Perjury without making any Defence at the Trial, it appearing upon *Affidavit* that he could not get his Witneſſes ready, and therefore the Verdict was ſet aſide.

Addiſon *verſus* Paterſon.

ONE Charles Fountaine was arreſted at the Suit of the Plaintiff, and the Bail-piece was thus marked, (viz.) Petrus Fountaine traditur in Balli'um, &c. qui arreſtatus fuit per

The Bail cannot plead the Miſnomer of the Principal in Abatement.

per nomen Caroli Fountaine; and in the Recognizance of Bail it appeared, that they were Bail for Peter Fountaine; and now upon a Scire facias brought against them, both the Principal and Bail plead this Matter in Abatement; and it was moved to set aside this Plea, because the Bail cannot plead this in Abatement; besides the Principal and his Bail cannot join in one Plea.

Curia. The Court was of Opinion, that the Bail could not plead this Misnomer in Abatement, tho' the Principal might; so a Rule was made for the Defendant to answer over.

Springett *versus* Chadwick.

Where a Note under Hand shall not be a Discharge of a Debt.

INdebitatus Assumpsit for several Things due to the Plaintiff, to which Declaration the Defendant pleaded in Bar, that he gave a Note of 20 l. to the Plaintiff in full Satisfaction of the Debt, &c. and upon a Demurrer to this Plea the Plaintiff had Judgment, because a Note thus given is no Discharge of a Debt or a Duty.

Palmer *versus* Byfeild.

Recognizance taken in *London*, and *Scire facias* on it to the Sheriff of *Middlesex*. * Allen 9.

A Recognizance was taken before a Judge of B. R. at his Chambers in Serjeants-Inn in Fleet-street, London, and afterwards a Scire facias was brought directed to the Sheriff of Middlesex, without mentioning that the Recognizance was enrolled; and now it was moved to quash the Proceedings on this Sci. fa. because it will not lie into * Middlesex upon a Recognizance taken at a Judge's Chamber, and the Court was of that Opinion; but that if the Recognizance had been enrolled, the Sci. fa. would have been good, either into London or to Middlesex, at the Election of the Party; but if not enrolled, then it lies into London only.

Clerk *versus* Dier. In Communi Banco.

Words negatively spoken, not actionable.

IN an Action on the Case for these Words spoken negatively, (viz.) I never came home and pox'd my Wife; the Plaintiff had a Verdict, but the Judgment was arrested by the Opinion of the whole Court, for that the Words were too loose to bear an Action.

Saladine *verſus Sir* Jacob Jacobſon.

THE Defendant was one of the Directors of the South-Sea Company, and the Plaintiff had obtained a Judgment againſt him for 1000 l. and by the * Statute 7 Geo. 'tis enacted, that every Director, *&c.* ſhall deliver on Oath before one of the Barons of the Exchequer before 25th *March*, 1721. two Inventories of all the Real and Perſonal Eſtate, of which he was poſſeſſed or entitled unto in his own Right, or of any other Perſon in Truſt for him, *&c.* which ſhall diſcharge him from the Demands of all other Perſons; all which Eſtates ſhall be forfeited and recovered by Virtue of that Act, and ſhall be paid into the Exchequer, and applied for the Benefit of the South-Sea Company.

Judgment againſt a Director of the *South-Sea* Company ſet aſide.

* 7 Geo. cap. 1. 5.

And now it was moved for the Opinion of the Court, whether the Defendant could avoid this Judgment upon his own Affidavit, that he gave in a true Inventory purſuant to the Act.

All that is required in this Caſe by the Statute, is to give an exact and true Inventory, and he ſwears that he gave an Inventory purſuant to the Act, ſo need not name all the Particulars; and 'tis abſolutely neceſſary that his Evidence ſhould be taken, becauſe he beſt knows whether the Inventory was true or not; ſo the Judgment againſt him was vacated.

Curia.

The King *verſus* Powell.

UPON a Motion for a Trial at Bar, it was offered for Cauſe, that a Jury who had tried this very Cauſe againſt one Jones, had found directly againſt the Charter of this Corporation, (viz.) That Foreigners might be choſen to all the Offices therein, by Virtue of an old Cuſtom antecedent to their Charter.

Whether an antient Cuſtom ſhall be good againſt a Charter.

But the Rule for a Trial at Bar was oppoſed, becauſe if it ſhould be granted, it would very much influence the next Election of any Perſon into any Office in this Corporation; beſides this Point might be brought before the Court by ſpecial Pleading.

Or by a ſpecial Verdict found at the Aſſiſes, and directed by the Judge, ſo there is no Occaſion for a Trial at Bar, eſpecially ſince there is nothing in this Caſe to be tried, but a

Curia.

Point in Law, (viz.) Whether an ancient Cuſtom ſhall be good, and prevail againſt the expreſs Words of a Charter.

Shelburne *verſus* Stapleton.

Tender how to be pleaded, and what are mutual Covenants. Ante 40, 68, 105.

THIS was an Action brought for a Penalty contained in certain Articles of Agreement, wherein the Plaintiff covenanted that on Payment of 1300 l. to him by the Defendant, on or before the Shutting the Books for the Chriſtmas Dividend, he (the Plaintiff) would tranſfer upon Tender or Payment, &c. and the Defendant covenanted to receive ſo much Stock, &c. and to pay the Money, &c. on or before the Tranſfer-Day, on the Penalty of ſo much, &c.

And it was further agreed, that upon any Default in the Defendant, it ſhould be lawful for the Plaintiff to ſell the ſaid Stock at the Market Price, and to retain the ſaid Sum of 1300 l. and if there was any Surplus, he (the Plaintiff) was to pay it over to the Defendant; but if the ſaid Stock ſhould be ſold at a lower Rate than would ſatisfy that Sum, then the Defendant was to make up the Deficiency.

And now upon an Action of Debt in the Common Pleas, the Plaintiff declared and ſet forth this Agreement, and that on ſuch a Day before the Shutting the Books, he was at the South Sea Houſe ready to tranſfer, and then and there tender'd to tranſfer, and ſtaid there till the Shutting the Books; and licet he had perform'd all on his Part, the Defendant was not there, nor any Body for him to accept the ſaid Tender, or to pay the Money; whereupon he ſold the Stock for 3321 l. that being the Market Price; and aſſigned for Breach of this Agreement, that the Defendant had not paid the Deficiency, ſo that he (the Plaintiff) is entitled to recover the Penalty mentioned in the ſaid Articles.

The Defendant pleaded in Bar, that he made a Feoffment of Lands to the Plaintiff in Satisfaction of the principal Sum, after the Penalty was forfeited; but upon a Demurrer to this Plea, the Defendant had Judgment in the Common Pleas; and now upon a Writ of Error brought in the King's Bench, it was inſiſted for the Defendant in Error, that this Judgment was given for Errors in the Declaration; for the Plaintiff in the Original Action had not laid a ſufficient Breach of this Agreement, which was to tranſfer the Stock on or before the Shutting of the Books, &c. and that the Defendant ſuperinde was to pay the Money; now the Plaintiff had ſet forth, that the Books were open to the 23d of December,

and that he on that Day and Hour, before the Shutting the Books at the South-Sea House, tender'd to transfer the Stock, but did not aver that to be the usual Place of Tender; so that if no certain and usual Place is assigned for a Tender, it must be made to the Person himself, unless the Nature of the Thing did ascertain the Place.

Now if a Tender is necessary, then another Question will arise, (viz.) Whether those are mutual Covenants or not; for if they are, then it must be admitted that each of the Parties may maintain an Action, without alledging the Performance on his Part; for if one covenants to do such a Thing, and the other covenants to do another Thing, each of them may have his mutual Action.

But that is not this Case; for here the second Thing to be done, so entirely depends on the First, that there is some precedent Act to be done, to intitle the Plaintiff to such second Thing; and in such Case he must shew that he had done all Things by him to be done, before he can bring his Action for not doing the other Thing; and so is the Case of * Thorp *versus* Thorp, (viz.) which was an Action on the Case on a special Agreement, by which the Plaintiff did agree to release the Equity of Redemption of a Mortgage, and all Sums of Money and Demands whatsoever; and in Consideration thereof the Defendant did agree to pay 7 l. &c. and mutual Promises were laid; and the Plaintiff averred Performance on his Part, and that the Defendant had not paid the Money; the Defendant pleaded in Bar, that after the Promise the Plaintiff had released all Demands; the Plaintiff craved Oyer of the Release, which was of the Equity of Redemption, and of all Actions and Demands, and then demurred to the Plea; and it was insisted to maintain the Plea, that the Plaintiff having laid mutual Promises in this Declaration, he might bring an Action for the Money before this Release was executed; and if so, then the Release is a good Bar to the Action, which is very true in some Cases where mutual Promises are laid; but not in this, because the Release was Part of the Agreement, (viz.) It was agreed that the Plaintiff should execute a Release, *&c.* and it was upon that Consideration that the Defendant agreed to pay the 7 l. therefore the Release was to precede, and till that was executed the Plaintiff had no Cause of Action; therefore it would be absurd to say, that the Release shall discharge that very Duty which it created.

* Lutw. 245. See 1 Vent. 147, 177, 214. 1 Sand. 319.

So in the principal Case the Plaintiff covenanted, that he would transfer the Stock on Payment of so much Money, on or before the Shutting the Books, &c. and the Defendant cove-

covenanted to receive the Transfer, and to pay or cause to be paid adtunc proinde; so that he is not to pay the Money till an actual Transfer, or a lawful Tender to transfer; therefore the Tender is in Nature of a Condition precedent, and is absolutely necessary in this Case; and if that is not well laid in the Declaration, the Plaintiff can have no Cause of Action.

'Tis true, where the Covenants are mutual an Action will lie for either of the Parties, without averring Performance on his Part; though one is the Consideration of the other, and tho' pro or in Consideratione, &c. is in the Declaration; but that is not this Case, for here the Defendant agreed to accept the Transfer of the Stock, and adtunc proinde to pay the Money; so that the Plaintiff cannot maintain an Action, unless the Stock was transferred, or the Tender to transfer, was well laid in the Declaration.

Besides he should have laid a special Performance on his Part, and not by such a general Allegation, as licet he had performed; all which was to be done on his Part; for the Action will not lie without alledging a special Performance.

Cro. Car. 384. 1 Vent. 114, 126. To which it was answered, that though the Averment of Performance was general, yet the Pleading over of a collateral Matter, had made that general Allegation good, it being bad only in Form.

Besides here is a certain Time appointed for the Performance of this Agreement on the Defendant's Part, (viz.) on Payment of 1300 l. &c. on or before the Shutting of the Books for the Christmas Dividend, and the Defendant agreed to accept so much Stock and to pay the Money; now if either of the Breaches are well laid, (viz.) The Non-acceptance of the Transfer, or the Non-payment of the Money, the Plaintiff is entitled to this Action.

But it being farther agreed, that upon any Default in the Defendant, it should be lawful for the Plaintiff to sell the Stock; and if the Money arising by such Sale would not satisfy the said 1300 l. then the Defendant would make up the Deficiency, (if all the rest was out of the Case) the Plaintiff is entitled to sell the Stock, and to maintain this Action against the Defendant in not paying the Deficiency, according to his Covenant.

Curia. The Case is thus: ff. An Action of Debt was brought for a Penalty mentioned in Articles of Agreement, &c. in which the Plaintiff declared, that by Indenture, &c. testatum fuit, that he sold South-Sea Stock to the Defendant, and covenanted to transfer the same before the Shutting the Books

for the Chriſtmas Dividend; and that the Defendant covenanted to receive and pay for the ſaid Stock before that Time; but if he did not, then the Plaintiff might ſell it; and if the Money ariſing by ſuch Sale would not make up 1300 l. then the Defendant agreed to ſupply the Deficiency, for which the Action was now brought.

It was objected, that by this Agreement the Plaintiff was to transfer the Stock, which the Defendant agreed to receive; ſo that unleſs the Stock were actually transferred, or a lawful Tender made to transfer it, the Defendant was not bound to pay the Money; and it was agreed, that this was not a lawful Tender, becauſe the Plaintiff ſet forth that it was made at the South-Sea Houſe, and did not aver, that was the uſual Place to make ſuch Tender; but yet the Plaintiff is entitled to this Action, becauſe theſe are mutual Covenants, and either Party may maintain an Action for Non-performance.

It hath been likewiſe objected, that the Money was not to be paid till a Transfer was made of the Stock, and an Acceptance of that Transfer; but this is a wrong Conſtruction of the Covenant, for he was to pay the Money before the Shutting the Books for the Chriſtmas Dividend, and not on the Acceptance of the Transfer; for otherwiſe it would be in his Power to pay, or not to pay, which would be inconſiſtent with his Covenant; therefore, in Conſtruction of this Covenant, the Intention of the Party is to be a Guide, and ſo far to govern as not to make the Agreement repugnant in it ſelf; and here the Intention was plain, that on Non-payment of the Money the Plaintiff might have this Action.

Beſides, the Time of Entring into this Covenant is to be conſidered, and that was when the Stock became an incertain Eſtate, as it was then; therefore the Party agreed to have the Money payable firſt.

The Judgment of the Common Pleas was reverſed.

Williams *verſus* Green.

Judgment againſt the Principal, and a Scire facias was brought againſt the Bail, and upon two Nihils returned, there was Judgment againſt the Bail; and afterwards an Action of Debt was brought againſt one of the Bail for all the Money due to the Plaintiff; and it was objected, that this Action would not lie againſt one of the Bail, becauſe the Judgment againſt them is joint.

Action upon a Recognizance of Bail may be brought againſt one or both.

It

Econtra.

It was said on the other Side, that the Action was brought upon the Recognizance of Bail, which is joint and several, and consequently good, either joint or separate; and so is the Case of * Cornish *versus* Clerke, Mich. 10 Geo. and so was the Opinion of the Court in this Case.

* *See* 1 Lev. 225, 226.

Herbert *versus* Morgan.

Motion in Arrest of Judgment for excessive Damages denied.

THE Plaintiff was arrested at the Suit of the now Defendant in a fictitious Action, without any Colour of Reason; and afterwards he brought an Action of False Imprisonment against the Defendant, and the Jury gave him 80 l. Damages; and upon a Motion in Arrest of Judgment, because the Damages were excessive, it was opposed by the Plaintiff's Counsel, and insisted, that he might have the Benefit of the Verdict, which was granted, and accordingly the Plaintiff had Judgment.

The King *versus* Reeves.

Indictment quashed.

UPON a Motion to quash an Indictment, for that it was præsentatum existit Quæ billa est vera, instead of Quod Billa est vera, a Rule was made to quash it Nisi causa, but no Cause was shewn, and so the Indictment was quashed for that Fault.

Morgan's *Case in the Exchequer.*

Custom, where 'tis well pleaded, where Amerciaments are to be affeered, where not.

IN Trespass for Taking his Cattle, &c. the Defendant justified as Servant to one Morgan, setting forth, that he (Morgan) was seised of the Manor of D. in Fee, to which a Court-Leet did belong, &c. and that Time out of Mind there had been a Custom, that quilibet tenens of a Freehold Tenement, and who was resident and an Inhabitant within that Manor, ought, upon Notice or Summons, to appear personally at the said Court-Leet three Times in every Year, (viz.) At the Feasts of St. Michael and St. Hillary, and at Easter; and for Default of Appearance at the said Courts, to pay to the Steward of the said Leet to the Use of the Lord 7 s. for every Default; and that if he did not appear at Two of the said Courts, but did appear at the Third, then to pay an Essoin-penny only; and farther, that if any such Tenant being

Fitzgib: 46. 108. v. S.C. Gilb. Rep. 200. Salk.

ſummoned to be of the Grand Jury, and ſhould not appear, that then he ſhould be amerced 7s. by the Steward, and that the Bailiff of the Manor, by Warrant from the Steward, might diſtrain for ſuch Amerciaments, and ſell the Diſtreſs, &c. then he ſets forth, that the Plaintiff was ſummoned to appear at two ſeveral Courts, and made Default; and that he was likewiſe ſummoned to be of the Grand Jury, &c. but did not appear at that Court, for which Defaults he was amerced 28s. and becauſe it was not paid, Richard Hughes, Steward of the ſaid Leet, made his Warrant, directed to the Defendant, to levy the ſame by Diſtreſs and Sale of the Plaintiff's Goods, Virtute cujus he diſtrained the Cattle, &c. and ſold them, and paid 28s. to the Steward, for the Uſe of the Lord of the ſaid Manor, quæ eſt eadem tranſgreſſio, &c.

And upon a Demurrer to this Plea, ſeveral Exceptions were taken to it.

(1.) That the Cuſtom was void, becauſe it was laid too general.

(2.) That it was void, becauſe 'tis for the Steward to amerce without any Affeerment.

(3.) That here was a double Amerciament for one and the ſame Default at one Court, (viz.) In not being of the Homage, and not appearing at that Court.

(1.) As to the firſt Exception, this Cuſtom is void, becauſe 'tis laid too general, (viz.) That quilibet tenens, &c. uſed and ought to appear, without Exception of the Quality, Degree or Sex of Perſons, whereas ſeveral are exempted from appearing and attending at the Leet, both by the Common Law and Statutes of this Realm; as Infants under the Age of 12 Years, and this is by the * Common Law; and Eccleſiaſtical Perſons are exempted by the Statute of † Marlbridge, (viz.) Archbiſhops, Biſhops, &c. are not to appear at the Sheriff's Tourns, and conſequently not at Leets, which were derived out of the Tourns; and if they ſhould be diſtrained for any Amerciament, &c. for not appearing in the Leet, they have a * Writ upon the Statute by Way of Privilege; for as they are not obliged by Law to appear at Leets, ſo they are not amerceable for not appearing; therefore this Cuſtom being general, and not ſetting forth theſe Exemptions, is void, and cannot ſubſiſt againſt the Statute of † Marlbridge, which is introductory of a new Law, and deſtroys all Cuſtoms and Preſcriptions againſt it.

* 1 Inſt. 172.

† Marlbridge cap. 10. anno 52 H. 3.

* F.N.B. 165. 2 Inſt. 120, 121. Regiſter 175.

† 1 Inſt. 15. a. 2 Roll. Abr. 168. W. Jones 270, 290.

(2.) This Custom is void, because 'tis laid for the Steward to amerce without an Affeerment, and this is directly against * Magna Charta, by which 'tis enacted, that Amerciaments shall be assessed by lawful Men of the Vicinage, (i. e.) shall be affeered by those lawful Men appointed in Courts-Leet, upon Oath, to settle and moderate the Amerciaments of such who have committed Faults arbitrarily punishable, and have no express Penalty expressed by any Law or Statute; so that to affeer is properly to tax, or to reduce a Thing to a Certainty by Persons on their Oaths, and ought to be per Pares; but this is a certain Amerciament imposed by the Steward, without any Affeerment, and is therefore void.

* Magna Charta, c. 14.

(3.) This is a double Amerciament for one and the same Default at the last Court, for the Plea sets forth, that the Plaintiff being summoned to be of the Grand Jury, did not appear, for which he was amerced 7 s. and he was amerced 7 s. more, for not appearing at that Court, which is double, and exceeds the Custom.

Econtra for the Defendant.

(1.) To which it was answered, (viz.) As to the first Exception, ſſ. The Custom is good and well pleaded, tho' the Exemptions are not set forth in the Plea, for that the Defendant is not obliged by Law so to do; but the Person distrained is to shew, that he is exempted from such Distress, if he is really entitled to any such Exemption, for the Custom is Lex loci; and if there was any Exemption by Virtue of the Custom, the Plaintiff ought to have shewn it; now to instance a parallel Case:

Upon disbanding the Army, an Act of Parliament was made, giving Privilege to the Soldiers to exercise their Trades any where in England; now, supposing that there is a Custom in the Borough of H. that no Person shall exercise a Trade therein, unless he is free of that Borough, and an Action should be brought against a Soldier upon a By-Law founded on this Custom, certainly the Custom may be laid in General, and the Exemption must come on the Soldier's Side; for 'tis not required, either by the Statute or Common Law, that Exemptions should be set out in Pleading of Customs; but the Party who is to have the Benefit of an Exemption, must set it forth, and shew that he is not within the Custom by Reason of the Exemption.

1 Sid. 17, 18.

1 Sid. 17, 18.

So where a Custom was alledged to distrain any Thing within such an Honour, it was objected to be too general, because several Things are not distrainable, but are privileged and exempted from Distresses, (viz.) Averia Carucæ, and Goods taken in Execution by the Sheriff, and Workmen's

Tools, &c. and the Book tells 'tis not neceſſary to ſet forth ſuch Exemptions, becauſe 'tis immaterial, and would make the Pleadings too long; therefore the Perſon exempted muſt ſhew it, and that he is not within the Cuſtom by Reaſon of his Exemption.

(2.) As to the ſecond Point it was argued, that this Cuſtom is good to amerce without an Aſſeerment; for though it hath been objected that 'tis contrary to Magna Charta, and that the general Rule of Pleading in ſuch Caſes, is to ſet forth an Amerciament, and that it was aſſeered; yet notwithſtanding Magna Charta, and that Rule of Pleading, there may be an Amerciament by Cuſtom to a certain Sum, for this Statute was made in Affirmance of the Common Law; and therefore tho' 'tis in the Negative, (viz.) That no Freeman ſhall be amerced, yet there may be a Preſcription or Cuſtom againſt it.

This was the Lord Coke's Opinion in his firſt Inſtitutes, (viz.) where a Statute in the Negative is in Affirmance of the Common Law, a Man may preſcribe againſt it; as for Inſtance; by the Statute of * Magna Charta 'tis provided, that Leets ſhall be holden twice a Year only, (viz.) after Eaſter and Michaelmas; yet a Man may preſcribe to hold them oftner, and at other Times, becauſe that Statute is but an Affirmance of the Common Law. 1 Inſt. 115. a. * Magna Charta, c. 35. Plow. Com. 465.

Beſides Peers of the Realm are within this Statute as well as Commoners, and the Amerciament of Peers is not uſed at this Day, becauſe 'tis reduced to a Certainty by Cuſtom, (viz.) A Duke to 10 l. and others to 5 l. and that ſuch Cuſtom is good; and by the ſame Reaſon an Amerciament may be reduced to a Certainty by Cuſtom; and if ſuch Cuſtom is good, then there cannot be any Occaſion of aſſeering an Amerciament, becauſe to aſſeer is only a Taxation reducing that to a Certainty, which was incertain before; but 'tis abſurd to ſay a Thing ſhall be reduced to a Certainty, which was certain in it ſelf before the Aſſeerment; ſo that the Reaſon of Aſſeering fails in this Caſe, if the Sum is reaſonable; but if 'tis unreaſonable, then the Cuſtom is void, and cannot ſtand. 8 Rep. *Greſly*'s Caſe.

It appears by the * old Books, that Cuſtoms to have particular Sums are good, as a Cuſtom that the Lord of a Manor ſhall have 3 l. for every Pound-Breach; this is good againſt the Tenants, though not againſt Strangers; ſo in the principal Caſe the Sum is reduced to a Certainty, and the Cuſtom charges the Tenants but not Strangers; a Man may preſcribe to have a certain Sum of Money from any * 11 H. 7. 14. 21 H. 7. 40.

Perſon found guilty of an Affray in a Leet, and ſuch Preſcription is good.

This Puniſhment is here called an Amerciament, but 'tis not properly ſo, but a Fine impoſed by the Court, whereas Amerciaments are always by the Jury; now Magna Charta mentioning Amerciaments, for that Reaſon they are to be affeered, for the Judgment in an Amerciament is general, (viz.) Quod ſit in miſericordia, and afterwards upon Eſtreats directed to the Coroner they are affeered; but a Fine is not to be affeered, becauſe not mentioned in that Statute, which is the Foundation of all Affeerments; and there are Authorities in † Point, that an Amerciament impoſed by a Steward of a Leet, which is in Nature of a Cuſtomary Fine, need not be affeered, though the Cuſtom had not aſcertained the Sum; therefore there can be no Need of an Affeerment where the Sum is made certain by the Cuſtom.

† 10 H. 6. 7. Bro. Amerciament 50.

(3.) As to the third Exception that the Plaintiff is doubly amerced for one and the ſame Fault, 'tis not ſo; and this appears by ſetting forth the Cuſtom, viz. that every Tenant who ſhould not appear, &c. (being ſummoned) to be of the Homage, ſhould pay 7 s. and that if he did not appear at two of the ſaid Courts, and appeared at the Third, he ſhould pay an Eſſoin-Penny; but if he did not appear at the Third, and pay the Eſſoin-Penny, he ſhould then pay 7 s. for each of thoſe Defaults; but the Cuſtom is not laid to amerce for Non-payment of the Eſſoin-Penny, for that was not to be paid, but where the Party neglected to appear at two Courts, and appeared at the Third; but here was a total Neglect; for the Defendant did not appear when he was ſummoned to be of the Homage, nor at two other Courts, nor at the third Court; the Cuſtom being that, if he did not appear at that Court, and pay the Eſſoin-Penny, then for every Default he ſhould pay 7 s. which muſt be underſtood for every Default in not appearing, &c. and not for Non-payment of the Eſſoin-Penny; ſo that this is not a double Amerciament for the ſame Default, but ſeveral Amerciaments for ſeveral Defaults in not appearing, &c.

Curia. 'Tis agreed, that this Cuſtom would have been well laid if the Exemptions had been ſet forth, and not ſo general that quilibet tenens ſhould appear, &c. but 'tis certain, that ſuch Exemptions which are by the Common Law, as of Infants under twelve Years, and Women, &c. were never yet ſet forth in Pleading of Cuſtoms.

But it hath been objected, that by the Statute of Marlbridge, Clergymen are exempted, and that this Cuſtom cannot

not prevail against that Statute, which is very true; but this doth not alter the Method of laying a Prescription or Custom in Pleading, which ever since the Statute was made, have been laid without mentioning any Exemptions, but generally as in this Case.

'Tis true, if any Persons had been exempted by the Custom it self, such Exemption must have been set forth in Pleading, because the Custom is entire; but 'tis not necessary to set forth any other Exemptions; therefore this Custom is well laid.

The Statute of Marlbridge never intended by those Exemptions of Ecclesiastical Persons to destroy Leges loci; but those Laws still remain as they did before, and Persons who will have any Advantage of them must plead them; for 'tis the Nature of Exemptions to be Exceptions out of the general Rule; and it would be not only informal, but unreasonable to set them all forth in Pleading; so as to the first Point, the Court were all of Opinion that the Custom was well pleaded.

As to the second Point it was agreed, that Amerciaments are to be affeered, unless they are in Nature of a Fine, and that there is no Occasion for an Affeerment; but where the Amerciament is discretionary, which is not this Case; for here the Sum is ascertained by Custom, and the Steward cannot encrease or diminish it; and therefore this Amerciament ought not to be affeered, (1.) because 'tis in Nature of a Fine for a Contempt; (2.) because the Custom hath ascertained it, and 'tis not discretionary; and of this Opinion were the Chief Baron and two more.

But the other Baron differed, for he was of Opinion, that if the Custom is abrogated by Magna Charta, then this Amerciament must be affeered, and that the Custom was abrogated by that Statute; by which 'tis enacted, that all Amerciaments shall be affeered per Pares; 'tis true, Fines are not within this Statute, but Amerciaments are, and a Fine is a Ransom from Imprisonment; and where-ever a Leet may imprison, it may assess a Fine, as a Price to redeem the Party from an Imprisonment, and a Commitment always follows a Fine; and therefore a Capiatur lies for finable Offences; but in Amerciaments, where the Judgment is that the Party shall be in Misericordia, (as 'tis in this Case) there they are to be affeered.

'Tis true, the Amerciament of Peers is made to a certain Sum, but 'tis by Order of the House of Lords; and this was to prevent the frequent Application to the House when a Peer

a Peer was to be amerced; but the principal Case being only a Nonfeasance, and no Breach of the Peace, or Contempt of the Court, the Steward cannot set a Fine for it; and if so, then it falls back to an Amerciament, and must be affeered per judicium Pariun.

(3.) As to the third Point, that here is a double Amerciament for one Default; the Chief Baron was of another Opinion, for the Amerciament was in two Instances, (viz.) For a Default in not being of the Grand Jury, and for a Default in not appearing at that Court; and where a Man is bound to appear in two Respects, and doth not appear, those are several Defaults.

And another Baron was of the same Opinion, (viz.) That 'tis not a double Amerciament for the same Default; for if an Officer who ought to attend the Court by Virtue of his Office, and likewise as a Grand Juryman, should make Default, he is to be fined in both Respects; and in one there is no Consideration to be had of the other; therefore notwithstanding this Objection, the Plea is good.

But two of the Barons were of Opinion, that this Custom was void for the Reasons following, (viz.) Every Custom must have a reasonable Commencement, which this Custom had not; for it being in Time immemorial, 7s. is too great a Sum to pay for such a Default; besides 'tis unreasonable, because it involves every Person in it, when some Persons may have a reasonable Excuse to be absent; as for Instance; a Sheriff may be called to attend on the King's Person, &c. Adjornatur.

Stamper *versus* Hodson.

A *Fi. fac.* and *Ca. sa.* taken out at the same Time, the Defendant was taken upon the *Ca. sa.* and the *Fi. fac.* was quashed.

THE Plaintiff having obtained Judgment in Debt against the Defendant, sued out a Fieri facias, and likewise a Capias ad satisfaciendum at the same Time; and thereupon the Defendant was taken in Execution, and it was now moved to quash the Fieri facias.

The Court was of Opinion, that the Plaintiff might for his own Security take out two Writs, but he can execute but one; therefore this Writ of Fieri facias was quashed.

Page *verſus* Barns.

By the Statute for the * Amendment of the Law, 'tis enacted, That Actions of Account may be brought againſt a Bailiff or Receiver, for Receiving more than his juſt Share; and an Action of Account was brought upon this Statute againſt the Defendant as Bailiff ad merchandizandum, who waged his Law; and upon Demurrer it was objected, that Wager of Law would not lie in Account againſt a Bailiff ad merchandizandum; but if ſuch Action had been brought againſt a Receiver, and the Plaintiff did not ſhew by whoſe Hands, there Wager of Law would lie; and ſo it was adjudged in this Caſe for the Plaintiff.

* 4 & 5 Annæ, cap. 16. Where Wager of Law will lie.

Salter *verſus* Groſvenor.

In Ejectment, &c. the Caſe was thus: A Corporation aggregate conſiſting of two Bailiffs and Burgeſſes, &c. and one of the Bailiffs and the Burgeſſes made a Leaſe in their politick Capacity to the other Bailiff in his natural Capacity; and the Queſtion was, Whether this Leaſe was good, or not.

Two Bailiffs of a Corporation, the one makes a Leaſe to the other, 'tis void.

It was argued, that it was void, becauſe the Bailiffs are an integral Part of the Corporation, and they both make but one Officer; and therefore where one is ſevered in any corporate Act, it makes that Act void; for if one Bailiff could do a corporate Act ſeparately, this Inconvenience would naturally enſue, (viz.) They might act directly contrary to each other; and therefore the Meaning and Intent of the Charter in making two Bailiffs was, that they ſhould be both preſent, and concur in every corporate Act.

2 Cro. 234. 13 H. 8. 10. 14 H. 8. 2, 29. Co. Litt. 112, 160, 187. Dyer 304. Chan. Rep. 21, 117.

And for this Purpoſe the Caſe of * Mood and the Mayor and Commonalty of London was cited, (viz.) Debt was brought in the Court of the Mayor and Aldermen of London, for a Penalty upon a By-Law made by the Common Council; and it was for 400 l. Penalty, of which 300 l. was to be to the Uſe of the Mayor and Commonalty; and it was held, that this Suit in the Mayor's Court was proper, if he could be ſevered, and the Court could be held before the Aldermen; but he being an integral Part, ſo as no Court could be held without him, it could not be ſued for in his Court, for then the ſame Perſon would be both Plaintiff and Judge.

* Salk. 397.

The

Curia. The Court was of Opinion, that a ſole Corporation, as a Biſhop, or a Parſon, could not make a Leaſe to himſelf, becauſe he cannot be both Leſſor and Leſſee; and the Law is the ſame in a Corporation aggregate, as Dean and Chapter, for a Leaſe cannot be made by the Chapter without the Concurrence of the Dean; and for the ſame Reaſon, a Leaſe cannot be made to the Dean without the Concurrence of the Chapter, but it may be made to any of the Prebends, becauſe 'tis not neceſſary that any of them ſhould join in the Leaſe, for a Prebend is not an integral Part of the Body corporate.

But in the principal Caſe the Bailiffs make but one Officer, and the one cannot act without the other; therefore if a Leaſe is made by the Corporation to one of them, he is both Leſſor and Leſſee, which cannot be.

If Proceſs ſhould be directed to the Sheriffs of London, and one dies, the Proceſs is gone, becauſe one Sheriff cannot act without the other, for they both make but one Sheriff; and for theſe Reaſons the whole Court was of Opinion, that this Leaſe was void, and Judgment was given accordingly.

DE
Term. Sanct. Mich.
Anno 11 Georgii, 1725.

Barnſly *verſus* Shrimpton.

After a Plea *In nullo eſt erratum*, 'tis never admitted to amend general Errors.

A Writ of Error was brought, and the general Error aſſigned, and likewiſe the Want of an Original, and a Warrant of Attorney; and after In nullo eſt erratum pleaded, a Rule of Court was obtained to amend the Errors aſſigned, but it was diſcharged upon a Motion for that Purpoſe; for after ſuch a Plea 'tis never admit-

ted to amend general Errors; 'tis like Not guilty pleaded by the Defendant, who is never admitted after such a Plea to justify, or to plead specially.

Cowper *versus* Ginger.

THE Plaintiff obtained Judgment against two Defendants in an Action of Debt, and one of them brought a Writ of Error, when it should be brought by both, and then he who would not prosecute ought to be summoned and severed; which not being done, this was held to be a Fault not amendable, and thereupon the Writ of Error was quashed; the like Judgment was given in Hillary-Term, anno 6 Geo. in B. R. in the Case of Brewer *versus* Turner.

Judgment in Debt against two Defendants, both must join in a Writ of Error.

Bond *versus* Turner.

JUdgment was obtained by the Testator, who died, and his Executor sued out a Scire facias against the Defendant, and had Judgment therein, and then he sued out a Capias ad satisfaciend. against him; and upon Non est inventus returned, he sued out a Scire facias against the Bail; and upon a Motion made to stay the Proceedings against them, as being irregular, because there were but four Days between the Teste and the Return of the Scire facias against the Principal, that Motion was granted; and then the Plaintiff moved to quash all the Proceedings for his own Expedition, which was likewise granted upon Payment of Costs.

Capias against the Principal, and *Sci. fa.* against the Bail, but it was irregular, because there were but four Days between the Teste and the Return.

Savill *versus* Snell.

IN an Action of Covenant in certain Articles of Agreement, wherein the Defendant covenanted to find Diet and Lodging for the Plaintiff for a Year, or to pay him 10 l. the Defendant, upon Affidavit made that there was not above 10 l. due to him, moved to bring it into Court, and that the Plaintiff might proceed at his Peril.

The Court could not ascertain what was due for Diet and Lodging; but because the Agreement was in the Disjunctive, (viz.) To find Diet and Lodging, or to pay 10 l. a Rule was made, that the Defendant might bring it into Court.

Money brought into Court.

Henly *verſus* Roſſe.

After an Arreſt the Plaintiff muſt declare in two Terms, otherwiſe the Defendant ſhall have a *Superſedeas*.

THE Defendant was arreſted, and no Declaration being filed againſt him within two Terms after the Arreſt, he procured a Superſedeas and was diſcharged, and immediately afterwards he was arreſted again by a Capias out of the Common Pleas, at the Suit of the ſame Plaintiff, and for the ſame Cauſe of Action; and upon a Motion to diſcharge theſe Proceedings, becauſe irregular,

The Court was of another Opinion, for that the Defendant had a Right to ſuperſede the Action, becauſe no Declaration was filed againſt him in Time; and as he had a Right to ſuperſede that Action, certainly the Plaintiff muſt have Liberty to proceed in another; for his Debt is not loſt for Want of declaring in Time, but only that Action is gone, and therefore a new Action may be brought.

Lawſon *verſus* Dickenſon.

Where Deeds are delivered upon a Special Truſt, the Party cannot detain them.

THE Plaintiff had an Eſtate mortgaged to him, and the Defendant, who was an Attorney, and who drew the Mortgage, did by that Means get all the Deeds relating to the Title into his Poſſeſſion, and now refuſed to deliver them to the Plaintiff, unleſs the Mortgagor would pay a Debt due from him, as the Defendant pretended.

And now upon a Motion for a Rule to deliver the Deeds to the Plaintiff, for that he (the Defendant) made the Mortgage, and therefore ſhall not be allowed any Money due to him from the Mortgagor, before or after the Mortgage, but that he ſhall deliver up the Deeds upon Payment of what is due for Drawing and Engroſſing it.

The Court was of Opinion, that an Attorney may detain Papers till the Money is paid for Drawing them; but that he cannot detain any Writings which are delivered to him on a Special Truſt, for the Money due to him in that very Buſineſs; therefore a Rule was made for the Defendant to deliver thoſe Deeds to the Plaintiff.

The like Rule was made between Hooper and Haward this Term, that an Attorney ſhould deliver ſeveral Deeds of Lands which he received for a certain Purpoſe, and would have kept them, becauſe he pretended his Client had a Mortgage on thoſe Lands; and the Rule was, that he ſhould de-

liver them by such a Day, or an Attachment should go against him; and accordingly he delivered them up on the Day, but was ordered to pay Costs and such Damages to the Party, as the Master should think reasonable for what the Plaintiff had sustained for Want of the Deeds; because it appeared that the Defendant had received the Profits, and kept the Plaintiff out of Possession by this Means.

And in the Case of Geary *versus* Fashion, a Rule was granted for an Attachment against the Defendant for not delivering Deeds to the Plaintiff; and the like Rule between Strong *versus* How for not delivering Deeds given to him in Order to borrow Money on them.

Elliott *versus* Cowper.

Action against the Endorsor of a promissory Note.

AN Action was brought against the Endorsor of a promissory Note, wherein the Plaintiff declared, that one Coates fecit notam in Writing, by which he promised to pay to the Defendant or Order, so much Money, &c. that the Defendant endorsed this Note to the Plaintiff, and that, licet he demanded the Money de eodem Coates, he did not pay it.

The Defendant demurred specially, for that the Plaintiff did not set forth that Coates of whom the Money was demanded, was the same Coates who drew the Bill; to which it was answered, that the Declaration sets forth that the Note was made by one Coates, and that the Plaintiff demanded the Money de eodem Coates, which is a good and certain Averment that he was the same Person; and the Court was of that Opinion.

Then it was objected, that the * Statute which gives Credit to such Notes, and a Remedy to recover on them where there was none at Law, enacts, that all Notes signed by any Person, *&c.* and it doth not appear by this Declaration, that Coates signed this Note.

* 3 & 4 Annæ, c. 9.

To which it was answered, that the Plaintiff set forth that Coates fecit notam, which implies Signing it; for he could not make it without signing it: The Plaintiff had Judgment.

The King *versus* Roberts.

Upon an Indictment and Acquittal in *B. R.* an Action was brought in the *Marshalsea* for a malicious Prosecution, but set aside.

THE Defendant was indicted and acquitted in this Court, and afterwards brought an Action in the Marshalsea against the Prosecutor for a malicious Prosecution; and now a Mo-

a Motion was made to ſtop the Proceedings there, becauſe this Court being poſſeſſed of the principal Cauſe, may better judge whether the Proſecution was malicious or no.

Econtra. It was inſiſted that Debt lies in the Marſhalſea, or in any other Court, upon Judgments in the Courts of * Weſtminſter; beſides the Plaintiff hath Bail below in this Action, and there is a Cuſtom in that Court, that the Attorney ſhall anſwer for ſuch Bail as he takes; ſo that if the Proceedings ſhould be ſtaid, the Plaintiff would loſe that Benefit which he hath below againſt the Attorney; for in Truth the Bail are worth nothing.

* Salk. 209.

Curia. Upon giving Bail here as below, and likewiſe giving good Bail, the Action muſt be ſtaid.

Anonymus.

An Executor was denied to have the Time to plead enlarged, the Rules being out, unleſs he would enter into a Rule not to plead any Judgments.

ſſ. AN Executor moved the Court to enlarge the Time for Pleading, the Rules being out; which was oppoſed, unleſs he would enter into a Rule not to plead any Judgments obtained againſt him after the Rules were out; for otherwiſe he might confeſs Judgments in the mean Time, and plead them in Bar to the Plaintiff's Demands.

Thereupon the Court ſaid they would not deprive the Plaintiff of any Advantage he had by Law to recover his Debt, unleſs the Defendant would enter into ſuch a Rule; which he refuſing, the Court would not enlarge the Time.

The King *verſus The Hamlet of* Spittlefields.

Settlement of a poor Man is where he dwells, and not where he works.

THE Caſe upon an Order of Removal, &c. ſſ. The Husband worked at a Silk-Throwſter's in the Hamlet of Spittlefields for five Years, but never lay where he worked, but at a Lodging elſewhere; the Juſtices of Peace being of Opinion, that the Husband had gained a Settlement by this Means, did after his Death by an Order remove his Widow thither, which Order was confirmed upon an Appeal; but both the Orders were quaſhed, becauſe the Court was of Opinion that the Husband's Working there gained no Settlement; and ſo it was reſolved in the Caſe of a Cobler who worked in a Stall in the Pariſh of St. Giles's, and had an Apprentice who worked with him in that Stall, and both lay in another Pariſh; it was adjudged that the Working in the Stall did not gain a Settlement, for that was in the Pariſh

where he lay, and that a Man cannot be removed from his Work; conſequently his Working in a certain Place ſhall not gain any Settlement there.

The King *verſus* Auſtin.

AN Order of Seſſions was made to hinder the Defendant from ſelling Ale; and the Exceptions following were taken to this Order.

Order of Seſſions to hinder the Defendant from ſelling Ale, quaſhed, becauſe the County was only in the Margin, and not in the Body of the Order.

(1.) For that it did not appear by the Order that it was a Common Ale-houſe.

(2.) It doth not appear that the Defendant was ſummoned.

(3.) The County is only in the Margin, and not in the Body of the Order; ſo that it doth not appear in what County this Ale-houſe is.

(1.) As to the firſt Exception it was anſwered, that every Ale-houſe is a Common Ale-houſe; and as to the ſecond Exception, that he was not ſummoned to appear before the Juſtices; 'tis true, a Summons had been neceſſary if the * Statute had not given the Seſſions or two Juſtices an abſolute Power to put down Ale-houſes at their Diſcretion; ſo that where they have an unlimited Power, 'tis not neceſſary to ſet forth any Summons in their Order; neither is a Summons ever ſet out in Orders, but in Convictions for Deer-ſtealing or the like; where great Fines are impoſed, there 'tis uſual to ſet forth that the Party was ſummoned; but 'tis not ſo in Orders for Baſtardy.

Econtra.

* 5 & 6 Ed. 6. cap. 25.

The Third and the moſt material Objection, that the County was not in the Body of the Order, but only in the Margin; it was ſaid, that it was not neceſſary it ſhould be in the Body of the Order, becauſe it was no Crime to keep an Ale-houſe; 'tis true, in all criminal Caſes, either upon Indictments, Convictions or Orders; if the County is only in the Margin, and not in the Body of the Order, the Proceedings ought to be quaſhed; and ſo it hath been reſolved ſeveral Times, as in the Caſe of the King *verſus* The Pariſh of Sheringham, Trin. 8 Geo. and the King *verſus* Marſh, *&c.* becauſe the County in the Margin ſhews only, that the Order was made in that County, but not that the Ale-houſe was there, or that the Perſon who kept it lived in that County; ſo that the Juſtices of the County have no Juriſdiction.

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The Court demanding of the Secondary how the Precedents were in such Cases, he answered, that the Court was divided in a Case between the King and Glegg, about the Summons being in the Body of the Order, and that was in a Case of Bastardy; and that the Name of the County in the Margin hath been held good in some Orders of Removal.

Curia. But the last Day of the Term this Order was quashed for that Fault, (viz.) For that the Name of the County was not in the Body of the Order, but only in the Margin; and the Court said, that several Orders of Removal had been quashed for the same Fault.

Graves *versus* King.

Where the Judgment shall be as of the first Day of the Term.

THE Plaintiff had Judgment in Hillary-Term 1722. which was now three Years ago, which Judgment was signed the 14th Day of February, two Days after that Term, and the Execution bore Teste the 12th of February, and the Warrant to the Sheriff was dated 28th March; now though the Judgment was signed on the 14th of February 1722. for the Benefit of Purchasers, it being provided by the * Statute, that Judgments as against Purchasers *bona fide*, and for a valuable Consideration shall be Judgments only from the Signing, and Entry of the Month and Year upon the Paper of Record; yet in Respect to the Plaintiff and the Defendant, and as to all other Purposes, 'tis a Judgment of the first Day of Hillary-Term 1722. by Fiction of Law; so that the Teste of the Execution ought to be the first Day of that Term, otherwise 'tis wrong; and therefore it was moved to quash this Execution.

* 29 Car. 2. cap. 3.

Econtra. It was said, that the Plaintiff was right in Point of Fact, though he was wrong by a Fiction in Law; therefore it was moved, that the Plaintiff might have Leave to enter Continuances to the last Day of this Term, so as to make it a Judgment of that Day; or that he might have Leave to get the Judgment signed as of the succeeding Term, as a Fine taken in Vacation may be entered either of the preceding or succeeding Term.

But the Court denied Leave to enter Continuances, this being now a Record of three Years Standing, neither would they give Leave to enter the Judgment, as of the succeeding Term; 'tis true, it hath been done in Fines, but these are by the Agreement of the Parties, but Judgments are obtained upon adversary Suits; therefore the Judgment in the principal Case must be of the first Day of Hillary-Term; tho' afterwards the Court was divided as to the Quashing this Execution. Skip-

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Skipwith *Mil' verſus* Green.

IN an Action of Covenant for Non-payment of Rent reſerved on a Leaſe for Years made by the Plaintiff, as Guardian to the Lord Craven, wherein he demiſed meadow, Paſture and arable Land to the Defendant, and amongſt the reſt all thoſe two Cloſes called or known by the Name of Lane's Meadows, and the Defendant covenanted to pay the Rent, and alſo 5 l. per Acre, for every Acre of Meadow or Paſture Ground, which he ſhould break up or plow; and the Breach aſſigned was, for that the Defendant had plowed up 112 Acres, called Lane's Meadows, by Reaſon whereof he is to pay 560 l. and for Non-payment thereof this Action was brought.

Parties to an Indenture are eſtopped to deny eſſential, but not deſcriptive Words.

The Defendant juſtifies, for that the Lands called Lane's Meadows, were, Time out of Mind, arable Lands, abſque hoc, that they were Meadow Lands.

And upon a Demurrer to this Plea it was inſiſted for the Plaintiff, that it was ill, becauſe the Defendant, who is a Party to the Indenture, ſhall not be admitted to ſay, that Lane's Meadows are arable, becauſe 'tis contrary to the Indenture it ſelf, by which he is eſtopped to ſay, that thoſe Lands are not Meadow; and this appearing on Record, the Plaintiff need not plead and rely upon it, but ſhall take Advantage of it by Demurrer; and the Defendant having joined in Demurrer, the Plaintiff muſt have Judgment.

Econtra.

To which it was anſwered, that the Plaintiff demiſed meadow, paſture, and arable Lands to the Defendant; now, if the Lands called Lane's Meadows are not arable, then that Word muſt be rejected, for without thoſe Meadows there is no arable Land at all.

As to the Eſtoppel it cannot be, becauſe the Leſſee cannot be eſtopped by the Words of the Leſſor, for the Calling the Lands by the Name of Lane's Meadows, are the Words of the Leſſor, by which he deſcribes the Lands as Meadow; 'tis true, any of the Parties to an Indenture are eſtopped to contradict or deny eſſential Words of the Deed; but in this Caſe they are only deſcriptive Words of a Meadow, which is not really ſo, therefore this is not contrary to any of the eſſential Words of the Deed, eſpecially ſince the Names of Lands are taken from Reputation in old Deeds to preſerve the Evidence of ſuch Lands, which otherwiſe might be loſt, and is ſeldom regarded by any Lawyer in drawing Conveyances, for the Names of the Parcels are entirely left to the Clerk.

Eſtoppels

Eſtoppels are odious in Law, and admitted meerly out of Neceſſity, becauſe they are concluding to ſpeak the Truth; as for Inſtance; a Stranger joined with the Owner of the Land in making a Leaſe; now, tho' in Reality this was the Leaſe of the Owner, yet 'tis likewiſe the Leaſe of the Stranger by Concluſion, otherwiſe his Signing it would be to no Purpoſe, ſo that 'tis an Eſtoppel by Neceſſity.

Beſides, Covenants and Agreements are to be taken according to the Intention of the Parties; and when the Defendant covenanted to pay 5 l. for every Acre of Meadow he plowed up, it muſt be intended for every Acre which was really Meadow, and not for Cloſes called Meadows.

Then it was objected againſt the Declaration, which is, that the Plaintiff, as Guardian to the Lord Craven, made this Leaſe; now, every Guardian (except a Guardian in Socage, which the Plaintiff doth not appear to be) is but * Tenant at Will, and by Conſequence cannot make a Leaſe for any certain Time, or Number of Years, and if ſo, then this Leaſe for Years is void; and ſo are all the Covenants depending thereon; and therefore the Plaintiff hath no Right to this Action; and all this Matter being on the ſame Record, the Defendant is not eſtopped to ſhew it.

* 1 Inſt. 57.

1 Inſt. 352.
1 Lev. 45.

Econtra. To this it was replied for the Plaintiff, that there are 500 Acres of Land demiſed, and certainly ſome of them muſt be arable; but the two Cloſes are ſpecially laid to be Meadow by an Acetiam demiſit duo prata vocat. Lane's Meadow; and as to the Objection, that thoſe are the Words of the Leſſor, and therefore ſhall not conclude the Leſſee; 'tis not ſo in an Indenture, for there the Words are of both Parties, tho' 'tis otherwiſe in a Deed Poll, for there the Leſſee may plead, that the Leſſor Nil habuit in Tenementis, &c.

As to the Objection to the Declaration, (viz.) That the Plaintiff appears on Record to be Guardian, who is but a Tenant at Will, and cannot make a Leaſe; this is contrary to the Indenture; and the Setting him forth to be Guardian, is only a Deſcription of the Perſon, but doth not prove that he who made the Leaſe is ſuch; therefore the Leſſee who enjoys this Land by Virtue of, and under this Leaſe, is eſtopped to ſay, that the Leſſor had no Right to make it.

Curia. The Caſe was recited by the Chief Juſtice to be thus: ſ. The Leſſor demands 5 l. per Acre for every Acre of Meadow plowed by the Defendant; and to entitle himſelf thereunto, lays the Plowing the Lands called Lane's Meadows; the Defendant pleads the Lands called Lane's Meadows, is not Meadow; but arable Lands Time out of Mind; the Plaintiff

demurred, for that 'tis called Meadow in the Indenture of Leaſe, and the Defendant joined in Demurrer.

Now it muſt be conſidered, that Deeds muſt be conſtrued according to the Intention of the Parties, and that the Name of Meadow in this Deed is only a Deſcription of the Land by Reputation, and no direct Averment that it is Meadow; therefore, to plead that they are not Meadow, is not contrary to the Intent of the Parties.

'Tis true, 'tis ſaid that the Plaintiff demiſed duo prata vocat. Lane's Meadow; now, tho' they were not really Meadow, yet by this Deſcription they would paſs in this Deed, and therefore it would be too ſtrict, and plainly againſt the Intent of the Parties, to conſtrue this to work an Eſtoppel.

Now the Reſervation of the Rent of 5 l. per Acre for every Acre plowed by the Defendant, muſt be intended for every Acre which is really Meadow, and not for Acres called Meadow, for the Name is but the Deſcription of the Land, and often differs from the Nature of it; for if the Nature of the Lands ſhould be taken from the Name, then all thoſe great Improvements of the Marſh-Lands in Lincolnſhire, which are ſtill called Marſh in Deeds, would likewiſe ſtill be Marſh.

It hath been truly ſaid at the Bar, that Eſtoppels are odious in the Law; and it would be very hard that the Defendant ſhould be bound by this Deſcription; and tho' all the Parties to an Indenture are bound by the Words thereof in Point of Law, becauſe they agree to it; yet that muſt be intended of material Words, and not to every minute and deſcriptive Words and Circumſtances.

Now, if theſe 2 Cloſes had been demiſed, as containing 500 Acres, and ſo mentioned in the Indenture, certainly the Defendant would not have been eſtopped to ſay there were not ſo many Acres, for which Reaſon Judgment was given for the Defendant.

Weldon *verſus* Buckler.

SCI. fa. againſt the Pledges in a Plaint in Replevin, which Plaint was removed into the Court of Common Pleas, where the Plaintiff declared, &c. and the Defendant avowed the Taking, &c. as a Diſtreſs for Rent, and had Judgment to have a Return irrepleviable; and thereupon a Writ of Error was brought in B. R. and the Judgment was affirmed, and then a Precept was directed to the Sheriff to make a Return of the Goods to the Defendant, and he (the Sheriff) returned an Elongata; whereupon the Defendant brought a Sci. fa. againſt

Scire facias againſt the Pledges in a Plaint in Replevin, is in Nature of a Declaration and amendable.

the Pledges, in which he ſet forth, that he had recovered Judgment in the Court of Common Pleas, prout patet de recordo, &c. in Communi Banco, which Judgment was affirmed in Error in the Court of King's Bench, prout patet, &c.

The Pledges demurred ſpecially, and for Cauſe ſhew, that this was contrary to the Truth, for that there is no Record remaining in the Common Pleas of this Suit, but only a Tranſcript thereof.

Curia. The Plaintiff ſhould have amended this Sci. fa. for 'tis in Nature of a Declaration, and conſequently amendable; now this being a Defect in Form, and being aſſigned for a Cauſe of Demurrer, Judgment muſt be for the Defendant; but on Payment of Coſts the Plaintiff had Leave to diſcontinue his Action.

Theed *verſus* Starkey.

Covenant to pay Taxes on the Lands, the Rates to Church and Poor are not Taxes on the Lands.

COvenant againſt an Executor for not paying Taxes according to a Covenant in a Leaſe made by his Teſtator, wherein he covenanted with the Leſſee to pay all the Taxes on the Lands demiſed; and the Breach aſſigned was, for not paying the Rates to the Church and Poor.

And upon Demurrer to the Declaration it was objected, * 5 Rep. 67. that the Breach was not well aſſigned, becauſe thoſe * Rates are perſonal Charges, and not on the Land; and for this Reaſon the Defendant had Judgment.

Wyvell *verſus* Stapleton.

No Coſts upon a Writ of Error where the Judgment is reverſed.

UPON an Action brought in the Court of Common Pleas on a South-Sea Contract, the Plaintiff had Judgment; and upon a Writ of Error brought in B. R. that Judgment was reverſed, and Judgment that the Plaintiff in Error ſhould recover his Debt and Coſts, as he ſhould below; and the Queſtion now was, Whether he is entitled by Law to any Coſts upon this Writ of Error, where the Judgment was reverſed and not * affirmed.

* 8 & 9 W. 3. cap. 11.

It was ſaid, that 'tis very plain he could have no Coſts in the Common Pleas on this Writ of Error, for no Coſts were

3 H. 7. c. 10. ever allowed on ſuch Writ before the Stat. of H. 7. by which 'tis enacted, That where a Writ of Error is brought to reverſe a Judgment before Execution is had; if the Judgment is affirmed, or the Writ diſcontinued, or the Plaintiff in Error is nonſuited, the Defendant in Error ſhall have his Coſts and Damages; now, ever ſince this Statute was made, where a

Writ of Error is brought in Delay of Execution of the Judgment, the Defendant in Error had always his Costs.

But the Costs which are to be recovered in this Case, are the Costs which should have been given in the Court of Common Pleas; and there is no Colour that they should be given for Delay of Execution, because the Judgment in the Common Pleas was against the Plaintiff in Error.

So that if Costs are to be given in this Case, it must be by the Statute of * Glouceſter; by which 'tis enacted, That the Plaintiff shall recover against the Defendant the Costs of his Writ, together with Damages; and that the said Act shall hold Place in all Cases where the Party is to recover Damages. * 6 Ed. 1. cap. 1.

But Writs of Error are neither within the Words or Meaning of the Statute of Glouceſter, therefore the Plaintiff can have no Costs; besides the Statutes which give Costs upon Writs of Error, are only where the Judgment is affirmed, for then it must be intended that the Writ of Error was brought for Delay of Execution of the Judgment; but there is no Statute which gives Costs upon a Writ of Error where the Judgment is reverſed, as it was in this Case; and 'tis plain the Common Law gives none.

And for this Reason the Judgment of the Court was, that no Costs shall be recovered on this Writ of Error; but it had been otherwise if the Judgment had been affirmed.

Wilson *verſus* Aldridge.

THE Plaintiff obtained Judgment at Law, and afterwards by a Fieri facias directed to the Sheriff, he levied the Debt on the Goods of the Defendant, who exhibited a Bill in Equity against the now Plaintiff, suggesting that there was more due to him from the Plaintiff than he recovered; and so got an Injunction to stay the Money in the Sheriff's Hands. Sheriff order'd to return his Writ.

The Plaintiff and his Attorney being Priſoners in the Fleet, move the Court against the Sheriff, to return the Writ of Fieri facias, and that he might be amerced till he do; and now the Court was moved in Behalf of the Sheriff for Direction what to do; for if he returned his Writ he must pay the Money, and then the Court of Chancery would commit him for not obeying the Injunction; and if he did obey it, then the Court of King's Bench would amerce him.

Curia. The Court would not take any Notice of the Proceedings in Chancery, but ordered the Sheriff to return his Writ, otherwise they would commit him; then the Court being desired to help the Sheriff to discover what Attorney or Solicitor carried on the Prosecution against him; they refused so to do, because that would be only to enable the Sheriff to move the Court of Chancery for an Attachment; so he had no Relief.

Townsend *versus The Assignee, and several Commissioners of Bankruptcy.*

Barrister at Law being joined with another, hath no Privilege to change the Venue.

A Motion was made to change the Venue from Worcestershire to London or Middlesex, for that there would be a very great Inconvenience to carry down all the Proceedings of the Commissioners; besides one of them is a Barrister at Law, and two others are Attornies; and 'tis the constant Rule of this Court to allow them to change the Venue in all transitory Actions, either to London or Middlesex; and the rather in this Case, because all the Assignees and Commissioners are made Defendants; and the only Evidence which can be against them, is what they have done as Commissioners here.

Econtra. The Counsel for the Plaintiff allowed the Commission to be good, and the Proceedings under it; but that the Fact on which this Action was founded, was done in Worcestershire, which was the Taking the Plaintiff's Goods; and the Privilege of a Counsellor or Attorney was never carried farther than when they were concerned in the Action in their own Right; for where another is joined with them, that Privilege is never allowed; besides the Bankrupt himself lived in Worcestershire.

Curia. The Court would not change the Venue, because the Plaintiff obliged himself to give Evidence only of such Matters as happened in Worcestershire; and when another is joined in a Suit with a Counsellor at Law, or that 'tis in auter droit, he hath no such Privilege as to change a Venue.

Cowper *versus* Ginger.

Judgment against two, and the Writ of Error brought by one, and quashed; the Defendant shall have Costs.

A Writ of Error was brought by one upon a Judgment given in the Common Pleas against two, which Writ was quashed; and thereupon the Defendant in Error moved for Costs, as if the Judgment had been affirmed; but the Plain-

tiff in the first Writ having brought another Writ of Error *de Recordo quod coram vobis resident, it was objected that the Defendant in Error is not entitled to Costs, unless that Writ is likewise quashed.

But it was argued that a Writ of Error coram vobis resident. would not lie in this Case, because the Record was not removed by the first Writ of Error; for the Difference is where the first Writ of Error abates or is discontinued, there the Record is removed, and Error coram vobis will lie; but where there is a Variance in the Stile of the Court, or the Parties are not sufficiently described, there the Writ of Error must be quashed; and in such Case the Record is not removed, because it varies from the Writ; and consequently the Record being not removed, a Writ of Error coram vobis will not lie. Of Writ of Error *coram vobis residen'*.

Now in this Case the Record is fully described in the Writ, and there is no Manner of Variance between the one and the other; and the Case is no more than if an Action should be brought by one, where it ought to be brought by two, there the Action must abate; and the Quashing the first Writ of Error was in Nature of an Abatement, because the Record being sufficiently described in the Writ, it abated or was quashed, because it was brought by one, when it should be brought by two; therefore the Writ of Error being naught, the Record was not removed; and if so, Error coram vobis doth not lie; neither is there any Thing inconsistent in the Record but ad damnum ipsius, when it should be ad damnum ipsorum.

Now the first Writ of Error was quashed for Matter appearing on the Record it self, and it was never a good Writ; and if so the Record was never removed, for the first Writ ought to be brought by both, because both entered into the Recognisance; but it being brought by one alone, he hath no Right to examine the Errors alone; therefore he ought to have joined the other in the Writ, and if he had been unwilling to proceed, he should be summoned and severed.

The Chief Justice said, that if a Stranger should bring a Writ of Error in this Court of a Judgment in the Common Pleas, the Record is not thereby removed, which he compared to the present Case, where the Writ of Error was Curia.

* It lies on a Judgment in the King's Bench for any Error in the Record, as Want of an Original, &c. or concerning Matters of Fact, as Nonage, Death of the Party, for Error in Fact is not the Fault of the Court; therefore it may be determined by the Judges when the Record is before them.

brought

brought by one when two ought to join; and they were all of Opinion that the Defendant in Error should have Costs, (tho' that Writ was quashed) as if the Judgment had been affirmed; and as to the Writ of Error coram vobis, they ordered to search Precedents; and afterwards three of the Judges were of Opinion, that Error coram vobis resident. did lie; and they grounded their Opinion upon the Case of * Walker *versus* Stokoe, which was thus: Judgment in Trespass against five Defendants, and a Writ of Error being intended to be brought, the Attorney left a Note with the Cursitor to make it out between the Plaintiff in Error, and five more, naming them: Note, That one of the Defendants is dead, and the Cursitor made the Writ against Four, without mentioning him who was dead; the Question was whether this was amendable, and adjudged that it was not, because all the Parties to the Judgment ought to join in a Writ of Error; 'tis true this was a plain Mistake of the Cursitor, whose Instructions were right; but yet it shall not be amended, because this Writ of Error was brought to reverse a Judgment; but the Statutes for Amendment of Writs were made for the Support of Judgments, so that Writ of Error was quashed.

* 5 Mod. 16, 69.

And it was now said by the Court, that after that Writ was quashed, the Plaintiff in Error brought a Writ of Error coram vobis resident. wherein the first Writ of Error was misrecited. it being of a Plea in Curia nostra, whereas the Suit was in the Reign of the King and Queen, and the Writ of Error was in the King's Time only; for the Record was misrecited, and for that Misrecital the Writ of Error coram vobis was quashed.

Andrews *versus* Paradise.

Covenant for quiet Enjoyment, and that he would do nothing to molest him, &c.

ERROR of a Judgment in the Common Pleas in an Action of Covenant, in an Indenture to lead the Uses of a Fine, wherein the Cognisor covenanted that the Cognisee should quietly enjoy, &c. and that he would not do any Thing to molest, hinder or prevent him (the Cognisee) or his Wife, or any Occupiers of theirs, in the quiet Possession or Enjoyment of the Lands, &c. but that the Defendant had molested him, &c.

The Defendant pleads that he had done nothing to molest, hinder or prevent the Cognisee or his Wife, &c.

The Plaintiff replied and aſſigned a Breach, for that he was ſeiſed of a Cloſe in ſuch a Field, being Parcel of the Lands now purchaſed under this Fine and Conveyance, and that there was a Lane leading to this Cloſe, thro' which Lane the Plaintiff had a Way to the Cloſe, and that the Defendant ſcilicet poſtea did erect a Gate croſs that Way, per quod the Plaintiff's Tenant was obſtructed in the quiet Poſſeſſion and Enjoyment of the aforeſaid Cloſe, &c.

And upon a Demurrer to this Replication the Plaintiff had Judgment in the Common Pleas; and now upon this Writ of Error brought, it was inſiſted, that the Judgment ſhould be reverſed, for that the Replication was only argumentative of an Obſtruction, (viz.) Per quod the Plaintiff's Tenant was obſtructed; whereas the Pleading ought to have been certain; beſides, nothing appears in this Replication, to ſhew that the Setting up the Gate was unlawful, for there may be another Way, which might make it neceſſary and lawful to ſet up a Gate; neither is it ſet forth where, or to what Place this Way leads, ſo that the Defendant cannot make any Anſwer to it, the Replication being too general; beſides, this is not an Obſtruction of enjoying the Cloſe immediately, but by Conſequence; and the Plaintiff hath not ſhewed that he had a Right to enjoy this Way. 8 Rep. 89. 2 Vent. 58.

It was argued for the Affirmance of this Judgment, that the Lane was left for the Uſe of this Cloſe upon the Incloſure of a common Field, and that 'tis convenient for the Purchaſer, and very neceſſary for preſerving the Poſſeſſion; and that this Lane was conſtantly uſed by the Occupiers of the Cloſe before this Conveyance and Covenant were made, which is not a Covenant as to the Right, but to ſecure the Plaintiff in the quiet Poſſeſſion; and the Breach being well laid, (viz.) That the Defendant obſtructed the quiet Enjoyment by ſetting up a Gate croſs the Lane; the Judgment ought to be affirmed. *Econtra* for the Affirmance of the Judgment.

This appearing to be a neceſſary Way for the Enjoyment of this Cloſe, then, Whether the Gate is ſet up by Right or Wrong, 'tis not material as to the Defendant; for in either Caſe, if 'tis an Obſtruction, it ought not to be erected there. Curia.

The Judgment was affirmed.

The King *verſus* Thead.

* 8 Annæ, cap. 9. Conviction upon the Statute for not aſſiſting an Officer of Exciſe in weighing Candles.

By the Statute * 8 Annæ, 'tis enacted, That the Officer, *&c.* may enter the Houſes, *&c.* by Day or by Night, where Candles are made, and if in the Night it muſt be in the Preſence

Preſence of a Conſtable, and may weigh the Candles, the Makers whereof muſt keep juſt Scales and Weights where they are made, and permit and aſſiſt the Officers in uſing them, under the Penalty of 10 l.

The Defendant was convicted upon this Statute, for not Aſſiſting the Officer of Excile in Weighing the Candles; and it was now objected, that the Conviction was wrong, becauſe the Statute directs, that if the Entry is in the Night-time, it muſt be in the Preſence of the Conſtable; and 'tis not ſpecified in this Conviction, Whether the Entry was by Night or by Day.

Econtra. 'Tis ſaid in the Conviction, that the Officer entered lawfully, which is ſufficient, without ſhewing any Circumſtances of his Entry.

This is a good Conviction for 10 l. upon an Information before the Juſtices, for they have a Juriſdiction in this Caſe, and nothing appears wrong in it; for it being alledged, that the Officer entered lawfully, it muſt be intended right, eſpecially when nothing appears to make it wrong; this Objection ſhould come on the Defendant's Part by Pleading.

The King *verſus* Edwards & al'.

Indictment for a Conſpiracy in giving a Man Money to marry a poor Woman incapable of Marriage.

THE Defendants were indicted, for that they per conſpirationem inter eos habitam, gave the Husband Money to marry a poor helpleſs Woman, who was an Inhabitant in the Pariſh of B. and incapable of Marriage, on Purpoſe to gain a Settlement for her in the Pariſh of A. where the Man was ſettled; and now it was moved to quaſh this Indictment, becauſe 'tis no Crime to marry a Woman and give her a Portion; and the Juſtices are not proper Judges what Woman is capable of an Husband, neither have they any Juriſdiction in Conſpiracies.

Econtra. It was inſiſted on the other Side, that there is a Crime ſet forth in this Indictment, which is a Conſpiracy to charge a Pariſh, &c. and a Conſpiracy to do a lawful Act, if 'tis for a bad End, is a good Foundation for an Indictment.

Timberly v. Child. Sid. 68. 1 Lev. 62. S. C. 1 Vent. 304. S. P. The King v. Starling. Sid. 174.

An Indictment for a Conſpiracy to charge a Man to be the Father of a Baſtard child, was held good, tho' Fornication is a Spiritual Offence, becauſe B. R. hath Cogniſance of every unlawful Act by which Damages may enſue.

So an Information for a Conſpiracy to impoveriſh the Farmers of the Excile, was held good, &c.

To which it was answered, that those were Conspiracies to do unlawful Acts; but it was a good Act to provide a Husband for this Woman. Econtra.

The Quashing Indictments is a discretionary Power of the Court, but in this Case the Defendant hath not shewed any Thing to induce the Court to quash the Indictment; and if the Matter is doubtful, the Defendant must plead or demur; but Indictments for Conspiracies are never quashed. Curia.

A bare Conspiracy to do a lawful Act to an unlawful End, is a Crime, tho' no Act was done in Consequence thereof; but if the Fault in the Indictment is plain and apparent, 'tis quashed for that Reason, and the Party shall not be put to the Trouble to plead or demur; suppose there is a Conspiracy to let Lands of 10 l. per Annum Value to a poor Man, in order to get him a Settlement, or to make a Certificate-Man a Parish-Officer, or a Conspiracy to send a Woman big of a Bastard-Child into another Parish to be delivered there, and so to charge that Parish with the Child; certainly these are Crimes indictable; but in this Indictment 'tis not set forth, that the Woman was likely to be chargeable to the Parish.

As to the Objection, that the Sessions have no Jurisdiction in Conspiracies, the contrary is true; they have no Jurisdiction in Perjury at Common Law, but by the Statute they have; and they have no Jurisdiction to indict for Forgery, but certainly they have Jurisdiction de conspirationibus, and such a Person as this Defendant is, was punished by Indictment at Common Law. Finch So. cap. 15.

But in Trinity-Term following, Judgment was given for the Defendant, because it was not averred in the Indictment, that the Woman was last legally settled in the Parish of B. but only that she was an Inhabitant there.

Sir John Walrond *and* Jacob Senior Henricus Van Moses.

UPON a Motion for Leave to change the Bail in this Cause, on that very Day it was to be tried by Nisi prius, because one of them was a very material Witness for the Defendant; the Counsel for the Plaintiff objected against it, (viz.) That the Bail should not be changed, because the Principal was run away, and the Bail had offered 100 l. reward to any Person who should bring him in; besides, the new Bail now offered instead of the Former, were Bail to an One of the Bail was a material Witness for the Defendant, and therefore he moved that new Bail might be put in, but it was denied.

an Action upon a South-Sea Contract, in which the Plaintiff had a Verdict for 13,400 l. so the Plaintiff in this Action cannot tell what they may be worth after the Payment of that Sum.

Curia. If the Bail surrender the Principal, they shall be admitted to put in new Bail, and then the old Bail may give Evidence at the Trial; but the Bail now offered being Bail in another Action for a considerable Sum, and a Verdict against the Principal, the Plaintiff in this Action cannot now have timely Notice to inquire into their Circumstances; therefore the Court will not force new Bail to the Action, but the old ones must stand.

Trover will lie here for a Conversion in *Ireland*.

Nota; At the Trial of this Cause, a Case was cited, that Trover lay in England, for Timber taken away and converted in Ireland; and this was by the Opinion of the late Chief Justice Holt, tho' it was objected, that it might bring the Title of Lands in Ireland in Question, which could not be tried here; but he answered, that as Trover was a transitory Action, it might be brought here for a Conversion in Ireland; nor shall any incident Question which may arise on the same, bar the Plaintiff of such Action; for if it should, then a Person being in England can have no Remedy here when the Defendant is guilty of a Trover in Ireland, and comes from thence into this Kingdom.

All which was now offered in Answer to a Question made, Whether an Action lay here on a Contract made in Holland; and the Case of * Brown and Hodges was cited, which was, Trover was brought here; and upon Not guilty pleaded, it appeared, that the Defendant was Tenant by the Curtesy in Ireland, and had cut down Trees there, and that the Reversion belonged to the Plaintiff; and upon a Case made for the Opinion of the Court, it was resolved, that in all local Actions, as in Trespass Quare clausum fregit; the Plaintiff cannot prove a Trespass any where else, but where 'tis laid in the Declaration, nor lay it in any other Place but where it was done; but that it was otherwise in transitory Actions, as Trover, &c. therefore the Plaintiff might lay the Conversion here, and prove it was done in Ireland.

* Salk. 290.

Nota also, That in the principal Case it was now resolved, that a Copy of an Agreement registered in Holland, and attested by a publick Notary there, may be given in Evidence for the now Defendant, especially since he proved that the Plaintiff took out another Copy of the same Agreement, and would not now produce it; therefore that Copy which the Defendant had taken out was given in Evidence, for 'tis plain

that the Plaintiff knew the Agreement, he having taken a Copy thereof, ſo could not be ſurpriſed.

Nota alſo, That at the ſame Time the Court held, that a Plaintiff who was in Holland might make Affidavit there, and get it atteſted by a Publick Notary; and that it ſhould be admitted as Evidence to hold the Defendant to ſpecial Bail here.

Warren *verſus* Conſett, *antea* Term. Mich. 9 Geo.

Nil debet is no good Plea to an Action of Debt on a Penalty.

THIS was a Writ of Erroꝛ on a Judgment in the Common Pleas in an Action of Debt foꝛ a Penalty in not perfoꝛming an Agreement, to receive and pay ſo much foꝛ a Transfer of Stock, &c.

The Defendant pleaded Nil debet; to which Plea the Plaintiff demurred and had Judgment, foꝛ that Nil debet was no good Plea; and that being now the only Queſtion, it was argued that the Plea was good; 'tis true, 'tis not ſo in an Action of Debt on a Bond, becauſe the Debt is immediately due; but 'tis otherwiſe in an Action foꝛ a Penalty, becauſe the Plaintiff could not demand it as a Debt oꝛ Duty; foꝛ 'tis not ſo without laying ſome Fact antecedent to his Demand, to entitle himſelf to this Action; and that muſt be ſomething dehors the Deed to ſuppoꝛt the Demand; foꝛ there is a Difference between a Bond foꝛ Perfoꝛmance of Articles, where the Condition appears in the very Body of the Bond, and an Obligation which hath a Defeaſance oꝛ Condition in it not in the Body of the Obligation; foꝛ in this laſt Caſe a Man may have an Action on the Obligation, without ſetting foꝛth any Matter dehors to entitle him thereunto; and in ſuch Caſe Nil debet is no good Plea, foꝛ the Obligation muſt be avoided by Matter of as high a Nature, and the Defendant is eſtopped by the Deed to ſay nothing is due; but 'tis otherwiſe in the firſt Caſe, foꝛ there the Debt is not due prima facie on the Deed, but foꝛ not doing ſome other collateral Act.

The Caſes following were cited to ſhew this to be the conſtant Difference, (viz.) That where Matter of Recoꝛd oꝛ Deed is mixed with Facts, there the general Iſſue Nil debet is a good Plea, as in an Action of Debt againſt a * Sheriff oꝛ Gaoler, foꝛ an Eſcape of one in Execution; though the Plaintiff muſt declare on the Judgment, Nil debet is a good Plea, and ſo 'tis to an Action of Debt on the † Stat. 2 Ed. 6. foꝛ not ſetting out Tithes; and ſo 'tis to an Action of Debt on

1 H. 7. 4. *b.*
21 H. 7. 14.
Broke, Iſſue joined 23.
* 1 Sand. 38.
† Cro. Car. 513.
Hutton 109.
Hob. 224.

on a Judgment against an Executor upon suggesting a Devastavit, because 'tis necessary.

Econtra. It was agreed on the other Side, that Nil debet is a good Plea where the Action is founded on a collateral Matter, and not comprised in the Deed; and these are Cases of daily Experience; as in Actions of Debt for Rent reserved on a Lease by Deed; and in Actions of Escape, and in all Acts founded on Acts of Parliament.

But the Action in the principal Case is entirely depending on the Deed, and absolutely founded on the Obligation therein, by which the Defendant bound himself in such a Penalty, which is an Obligation to all Intents and Purposes; but where the Lien arises on the Deed it self, there Nil debet is no good Plea, though Matter of Fact is averred; and wherever an Action of Debt is brought on an Obligation for Payment of Money, it must be averred that the Debt is not paid, which is Matter of Fact; and yet in such Case Nil debet is no good Plea.

2 Sand. 344. Hardres 332. Salk. 565. But where-ever the Plaintiff declares on a Fact collateral unto, and not arising within the Deed, there 'tis a good Plea; but 'tis a general Rule that Nil debet is no good Plea to any Action founded on a Specialty or on a Record; and it would be of very ill Consequence if it should, and particularly in this Case; for then the Plaintiff must not only prove that this Deed was executed, but he must also prove the Time of the Opening the Books, the Registring the Contract, the Tender made by him to transfer, and the Refusal of the Defendant to accept, &c. and to pay the Money; and after all this Hardship, if Nil debet should be a good Plea to a Specialty, (for so this Obligation is) the Defendant may surprise the Plaintiff by giving a Release in Evidence, or by proving the Obligor was not Compos mentis at the Time of making this Obligation, and such Difficulties might make Persons defend their Causes where there is no Colour of Defence, but only some Hopes that the Plaintiff might fail in proving some of those Things; therefore the Law will not admit of such complicated Issues, but will always have the Issue a single Point if possible, and for that very Reason will never permit a Man to plead the general Issue to a Specialty; besides the vast Difference this Issue may make of Costs at the Trial, which probably may be swoln from 10 l. (which might be competent Costs upon non est factum) to 100 l. upon such a complicated Issue as Nil debet; besides this Plea contradicts the Deed, and therefore ought not to be allowed more than Nil habuit in tenementis in an Action

of Debt for Rent reſerved upon an Indenture, which was never yet allowed.

To which it was anſwered, that though there be ſome Ingenuity to affirm that where the Facts on which an Action is founded are continued, and appear in the Deed it ſelf, there Nil debet is no good Plea; yet a bare Affirmation without any one Authority to ſupport it, will be of no Force. *Econtra* for reverſing the Judgment.

The Court took Time to give Judgment, becauſe the Court of Common Pleas were unanimous in their Judgment.

The King *verſus* Singleton.

MAndamus to the Defendant who was Surrogate to Dr. King, Archdeacon of the Dioceſe of London, to ſwear one Fane Church-warden of Colcheſter, being elected by the Inhabitants, according to the Cuſtom of that Pariſh; who returned, that it did not appear to him per aliquod ſcriptum, that Fane was duly elected; and that the Biſhop of London had inhibited Dr. King, and any Perſon acting under him to ſwear this Fane; ſo he (the Surrogate) cannot ſwear him; and that the Mandamus did not ſet forth that Colcheſter was within the Dioceſe of London. *Mandamus* to ſwear a Church-warden; the Surrogate made an ill Return.

To which it was anſwered, that though the Mandamus doth not preciſely mention Colcheſter to be within the Dioceſe of London, yet when the Return mentions that the Biſhop of London had inhibited the Archdeacon, *&c.* that is ſufficient to ſhew the Court that it was within his Dioceſe; therefore a peremptory Mandamus was granted, as it was in the Caſe of the King *verſus* Cardigan; for the Court ſaid, that where the Church-wardens are to be elected by the Pariſhioners by Preſcription, it ſhall not be in the Power of the Parſon to hinder them.

And on the laſt Day of this Term in another Caſe between the King and White, a Mandamus was directed to an Archdeacon to ſwear a Church-warden, who was elected by the Inhabitants, &c. and he returned non fuit Electus; this was adjudged to be no good Return, and a peremptory Mandamus was granted.

Nota; A Motion was made by the Plaintiff to examine Witneſſes at a Judge's Chamber, they being Mariners, and now going to Sea on a long Voyage; which was oppoſed on Seamen who were Witneſſes, and going a long Voyage, the Plaintiff moved that they might be examined at a Judge's Chamber, but denied.

the

the other Side, because this would be to deprive the Party of the Benefit of their Evidence by cross Examining them at the Trial; 'tis true, such Motions have been made where the Defendant would put off a Trial, or where he desires some other Favour of the Court; but here 'tis in the Power of the Plaintiff to bring on the Trial when he pleases; and the Defendant cannot bring it on but by Proviso, and then this Motion might be proper.

Curia. This Motion would have been granted, if the Defendant had agreed to it; or if he had desired any Favour of the Court, it should not be granted unless he would admit the Plaintiff to examine his Witnesses; but that being not this Case, the Plaintiff took nothing by this Motion.

The King *versus* Edwards.

Information against Overseers of the Poor, for removing a sick Person.

UPON a Motion for an Information against the Overseers of the Poor of the Parish of Wadhurst, for removing a poor Woman who had the Small-Pox into another Parish, and against her Will, from the Parish of Wadhurst, where she was an Inhabitant; and the Sessions refusing to give any Relief,

Curia. The Chief Justice said, that where a Person is visited with Sickness by the Act of God, he ought not to be removed from the Place where he is sick, farther to endanger his Health, without an Order of two Justices; and if such Order is made by the Justices, knowing him to be sick, an Information shall go against them; thereupon a Rule was made against the Overseers to shew Cause, &c.

And on another Day they came to shew Cause, &c. and denied the Fact alledged against them; and moved that the Rule might be discharged, for otherwise this Woman who was really settled in that Parish to which she was removed, would upon the Trial of this Information, be Evidence against the Parish of Wadhurst, and gain a Settlement there.

But the Court was of Opinion, that the Fact being controverted, and carrying such a Barbarity with it, 'tis requisite that it should be tried upon an Information; and then the Jury would be proper Judges of the Truth.

The King *verſus* Harris.

Demurrer to an Indictment for a Riot by Reaſon of an inſenſible Word.

INdictment for a Riot on a Petty Conſtable in the Execution of his Office; and upon a Demurrer it was objected, that this Indictment was ill, becauſe it was for a Riot in & ſuper pet. Con'bularium, when there is no ſuch Word as Pet. which was granted on the other Side, but that Con'bularium, with a Dash, made the Indictment good.

Curia.

The Word Pet. is Surpluſage, and ſhall therefore be rejected; and the Indictment is good without it, for the other Word makes it good: Judgment for the King.

Hunſton *verſus* Howard.

Want of an Original aſſigned for Error.

THE Plaintiff had Judgment in the Court of Common Pleas, which was now above ten Years ſtanding, when the Defendant brought a Writ of Error in B. R. and aſſigned the Want of an Original for Error; and now the Defendant in Error pleaded In nullo eſt erratum, and the Want of an Original being not yet certified, he moved to put it off till next Term, that he might in the mean Time procure an Original to be filed, this being a Contrivance of his own Attorney to defraud him.

Curia.

This Motion ſhould have been made before the Cauſe was put in the Paper; but it having the Countenance of Fraud, it was ruled to go over upon Payment of the Coſts of the Day.

Cuband *verſus* Dewsbury.

Prohibition granted againſt the Proceedings in the Spiritual Court, the Defendant having given Bond to deliver a Will which he got out of that Court.

PRohibition, &c. the Caſe was thus, (viz.) The Plaintiff in the Prohibition procured a Will to be delivered to him out of the Prerogative Court of York, and at the ſame Time entered into a Bond in ſuch a Penalty, &c. with a Condition to redeliver it again into that Court, at or before ſuch a Day, &c. which not being done, the Spiritual Court proceeded againſt him pro læſione fidei, and to have the very Will brought into Court.

The Defendant pleaded, that he had entered into a Bond to redeliver the Will, on which they might have a proper Remedy,

medy, which Plea being rejected by that Court, they proceeded against him there; and now he moved for a Prohibition.

Econtra. Which was opposed by the other Side, for that the Witness to the Bond was dead, and probably if it was put in Suit, they might not recover; besides, the Penalty might not be sufficient to make Amends for the Damages sustained by those who were interested in the Lands conveyed by this Will, by not having it produced; therefore 'tis necessary that they should have a Power to enforce him to bring it in.

* Cro. Eliz. 607, 844. Besides, 'tis in the * Election of the Party either to put the Bond in Suit, or to sue in the Spiritual Court; and now some Instances were shewed in parallel Cases.

1 Lev. 138. 1 Sid. 217. ff. A Man forged an Ordination, and being prosecuted in the Spiritual Court, he pleaded that Forgery was triable at Common Law; the Court rejected that Plea; and thereupon the Plaintiff moved for a Prohibition, but it was denied, because the Prosecution was in order to a Deprivation.

1 Sid. 281. So where the Suit was in the Spiritual Court for Taking the Bells out of the Steeple; the Defendant pleaded the General Pardon; and that Plea being likewise rejected, the Plaintiff moved for a Prohibition, and that was denied, because the Suit being pro salute animæ, was not pardoned.

* Gardner's *Case*. 2 Roll. Rep. And in * Gardner's Case, where the Executors gave Bond for Payment of a Legacy, Judge Doderidge was of Opinion, that the Obligee might sue for the Legacy in the Spiritual Court, or at Common Law upon the Bond; for that the Taking the Bond had not altered the Nature of the Legacy.

Curia. But the Court was of a contrary Opinion, for that the Legacy was drowned in the Bond, and that the Opinion of Judge Doderidge was not Law, and therefore inclined to grant a Prohibition.

The King *versus* Brereton.

Information for a Libel laid in the Disjunctive, (*viz.*) *Scripsit seu scribi curavit*, not good. INformation for a Libel laid in the City of Chester, which being a local Offence, could not be tried there, but in the County of the City; therefore it was sent by Mittimus directed to the Chamberlain of the County Palatine of Chester, with Direction, that he should transmit it to the Mayor of the City of Chester, in order to have it tried in the County of the City before him; and that after the Trial the Chamberlain should take it back again from the Mayor, and return it into this Court, that the Party may have a Day in Court to hear the Judgment thereof.

The Chamberlain accordingly transmitted the Record to the Mayor, who had the Cause tried, and a Verdict against the Defendant; and then the Mayor, who was the Judge of the Court returned the Record, which Return was certified by the Chamberlain.

And now it was moved in Arrest of Judgment, and first it was objected, that the Record ought to be returned by the Chamberlain, for the Mittimus is directed to him, and ordered to be returned by him; 'tis true, the Mayor was likewise Chamberlain, but he is so in a different Capacity, and his Certificate may be as Chamberlain of the City, and not of the County Palatine; and he returns it by Way of Verification of what the Mayor returned.

Then as to the Information, the Fact is laid very incertain, for 'tis, that the Defendant Scripsit fecit & publicavit seu scribi feci & publicari causavit, which is very incertain, and no proper Defence can be made, because 'tis in the Disjunctive; therefore where an Indictment was for making or causing to be made, a Bill of Lading, this was held ill, because in the Disjunctive. The King v. Stokoe. Salk. 371. 5 Mod. S.C.

Then it sets forth, that the Defendant made quendam libellum in quo continentur hæc scandalosa verba, &c. setting forth some Words, but not the whole Pamphlet, which he should have done, or averred, that there were no Words in it to qualify those which were incertain.

As to the first Objection against the Return of the Record, that it ought to be returned by the Chamberlain, and not by the Mayor, the Precedents are otherwise, (viz.) That the Return by the Mayor is good; but if it was not, the Information cannot be void for that Reason, because the Plaintiff may procure a new Mittimus. Econtra.

As to the Objection, that this Information is in the Disjunctive; 'tis true, a Man ought not to be punished where there is any Incertainty in the Crime committed; but a Disjunctive doth not always make a different Crime, but sometimes 'tis explanatory, and therefore Writing a Libel, or causing it to be writ, is the same Offence; and if so, this Information is good; 'tis like an Indictment on the Statute 5 Eliz that a Man exercised Artem sive mysterium, and that was held no Fault. Moor 813.

And as to setting forth the whole Libel, or the Contents thereof, 'tis not material so to do, for if it should, most Informations would be set aside for that Reason.

On the other Side it was answered, that this Court will take judicial Notice of the ministerial Officers of all Counties; The Reply.

ties; and if the Chamberlain hath a Command over the whole County Palatine (as certainly he hath) the Court will intend, that this Return was made by him as Chamberlain of the County Palatine, and no other shall be intended.

4 Inst. 212.

And that this Record is well returned, and the Day given by the Mayor (who was the Judge that tried the Cause) to hear the Judgment of this Court; and if no Day had been appointed on the Roll, the Court might appoint a Day in entering the Continuances until a Plea or Demurrer.

1 Roll 485.

And lastly, There is no Incertainty in the Fact, for to write, or cause to be written, is the same Offence.

Curia.

But the Court was of another Opinion, for if one causes another to write, he doth not write it himself, he may be guilty of a greater Offence, but still 'tis not the same Offence; and Occasion may be given to another to write by Talking innocently to him.

All criminal Charges ought to be certain, so as the Defendants may make certain Answers to it; and as to what was said, that an Indictment for exercising Artem sive mysterium, was held good; there the Art was not the Cause of the Indictment, but the Exercising it; and therefore if it had been to exercise the Art, or causing it to be exercised, the Indictment would be ill: So if a Man was indicted for Beating or causing another to be beaten, such an Indictment would be ill, by Reason of the Incertainty; for causing a Thing to be done may be by several Means.

Sparks *versus* Keeble.

Plea not answering the Declaration, not good.

IN Trespass Quare vi & armis, clausum fregit & intravit, &c. and took away the Plaintiff's Hops, and destroyed his Hop-poles, &c. The Defendant, as to the Force and Arms, pleaded Not guilty, and justified the Entry, for that the Place where the Trespass was supposed to be done was his (the Defendant's) own Ground, and that he entered and distrained the Poles Damage-feasant.

And upon a Demurrer to this Plea it was insisted for the Plaintiff, that tho' the Defendant might distrain the Poles, yet he could not destroy them; and in his Plea he made no Answer to the Destroying them as he ought.

Curia.

No Justification can be good for destroying a Thing distrained, for all Distresses ought to be safely kept; so the Defendant having not answered that Part of the Declaration, Judgment must be for the Plaintiff.

Arthur *verſus Commiſſioners of Sewers in* Yorkſhire.

THE Plaintiff was choſen Clerk to the Commiſſioners of Sewers, at a Meeting, by a Majority of forty-three then preſent; and afterwards, at a ſecond Meeting, they made an Order to turn him out, and they choſe another; and now the Plaintiff moved for a Certiorari to have the Order returned, which was oppoſed by the Commiſſioners, who offered to read Affidavits, that the Plaintiff was ſurreptitiouſly choſen without due Notice given to the Majority of the Commiſſioners, who formerly made an Order, that the Commiſſioners ſhould always give thirty Days Notice of every Meeting; but when this Clerk was choſen there were but ſix Days Notice given, on Purpoſe to ſurpriſe the reſt of the Commiſſioners in the Choice of the Plaintiff, for great Part of the Commiſſioners could not poſſibly be there.

Certiorari is not a Writ of Right, but may be granted at Diſcretion.

On the other Side it was ſaid for the Plaintiff, that the Court would not inquire into the Merits of his Election till a Certiorari was granted and returned; for ſince the Commiſſioners have Power by the Statute to elect a Clerk, and the Plaintiff is elected by them, he is entitled to ſeveral Perquiſites by Virtue of ſuch Election; and the Commiſſioners having thereby executed their Power, they ſhall not be permitted to recall their own Act, for if they ſhould, they might chuſe a new Clerk at every Meeting, and turn out the other, and there will be ſuch a Conteſt amongſt them as may render the Office precarious; and for this Reaſon the Court would not permit the Affidavits to be read, but would grant a Certiorari, which was a Writ of Right.

But this was denied by one of the Judges, who ſaid, that a Certiorari was not a Writ of Right, for if it was, it could never be denied to grant it, but it hath often been denied by this Court, who, upon Conſideration of the Circumſtances of Caſes may deny it, or grant it at Diſcretion; ſo that 'tis not always a Writ of Right.

'Tis true, where a Man is choſen into an Office or Place, by Virtue whereof he hath a temporal Right, and is deprived thereof by an inferior Juriſdiction, who proceed in a ſummary Way, in ſuch Caſe he is entitled to a Certiorari ex debito Juſtitiæ, becauſe he hath no other Remedy, being bound by the Judgment of the inferior Judicature.

Therefore in this Case a Certiorari was granted, but the Return thereof was quashed for some Irregularity; and thereupon the Court was moved for another Certiorari.

One of the Judges opposed the Granting it, because the Removal of the Orders by Virtue of the Certiorari would not determine the Right of the Plaintiff, which was the Reason of quashing the Return of the former Certiorari.

But by the other three Judges the Certiorari was granted.

The King *versus* Serle.

Mandamus to swear a Mayor, &c.

Strange Rep. 1175.

MAndamus to the Defendant, late Mayor of Penrin in Cornwal, to swear Peter Pindar Mayor, he being duly elected.

The Defendant made this Return, (viz.) That this Town was incorporated by Letters Patent made by King Jac. 2. and to consist of a Mayor, and so many Burgesses; and that they were to choose a Mayor every Year out of the capital Burgesses who is to act as Mayor for a Year, and until another was duly chosen; that on St. Matthew's Day (being the Day appointed by the Charter) and in such an Year, one Penhallor was chosen and sworn Mayor, and died within the Year; and that after his Death, the Corporation proceeded to a new Election according to their Power, so to do by Virtue of the Letters Patent, who chose the now Plaintiff Mayor, who for sometime acted under this Election.

That afterwards an Information in Nature of a Quo Warranto was brought against him, for usurping this Office of Mayor, prout patet per eandem, (instead of prout patet per Recordum) and that he justified by Virtue of the said Election, on which Justification two Issues were tried; the first was, if the Plaintiff was duly elected Mayor; the second was, if he was duly sworn into the Office, and the first Issue was found for him, and the second against him; and thereupon a general Judgment of Amotion or Ouster was given against him, (viz.) quod Petrus Pindar nullo modo se intromittat, &c. sed ab eisdem & eorum quolibet penitus excludetur & amovetur, but doth not say, that this Judgment was given upon this Information.

And now he moved for a Mandamus, and the Defendant pleaded this Judgment of Ouster against granting that Writ; but it was insisted for the Granting it, that tho' the Judgment of Ouster was entered against him; yet as his Right to be Mayor, was by Virtue of his Election, and the Right of exer-

exercising that Office was by Virtue of his being sworn; so the Judgment against him for usurping the Office not being duly sworn, can be no Bar to his Exercising it, when he is duly sworn. Salk. 432.

The Judgment in this Case, is like where several Issues are tried, and some found for the Plaintiff, and some for the Defendant, 'tis true in such Case, the Court will give Leave to enter Judgment for the Plaintiff; but they will likewise give the Defendant Leave to take Advantage of the Issues found for him, as they appear in the same Record.

This may be compared to an Attainder where the Heir or Executor of the Person attainted brings a Writ of Error, tho' in such Case he can neither have Executor or Heir; yet the Attainder cannot be pleaded in Bar to the Writ, for non valet exceptio ejusdem rei cujus petitur dissolutio; so in the present Case to return a Judgment of Ouster for not being sworn as a Cause why the Plaintiff should not now be sworn, is as much as to say you are not sworn; therefore you shall never be sworn, because you exercised this Office before you was sworn.

It may likewise be compared to a Deed of Feoffment, where the Feoffee enters before Livery and Seisin made by the Attorney who was to make it, he (the Attorney) shall never say, that he is not obliged to make Livery, because the Feoffee entered before it was made.

'Tis true, the Plaintiff was not duly sworn at the Time he was elected, but if he could not be sworn afterwards, then the Charter would be lost, because he is not Mayor, not being sworn, and there is no Mayor to act in the mean Time.

If a special Information should issue against this Mayor for not being sworn, and he is found guilty, certainly he might be sworn afterwards, which is the same Case as appears on this Record; and most of the Cases of this Nature are for Male-feasances after Elections.

'Tis to be considered, that there is a Writ of Quo warranto clamat, &c. and an Information in Nature of a Quo warranto as in this Case, that the Judgment in the one is Final, it being a civil Suit, and the King's Writ of Right; but 'tis not final in an Information in Nature of a Quo warranto, but if it was so generally; yet it could not be so in this Case, because the Plaintiff's Right appears in the same Record; therefore a general Judgment of Ouster ought not to be entered, but it should be with a Salvo jure, as in the King's Case, when Judgment is given against him in a Quo warranto; 'tis true, where the Judgment is for the King against the Co. Ent. 549. 2 Inst. 282.

the very Liberty claimed, and this upon an Information in Nature of a Quo warranto, there 'tis final.

2 Cro. 160. Yel. 190.

But in the preſent Caſe, the Right of the Plaintiff appears on the very Face of the Record; therefore tho' the Non-ſwearing may be a good Return for not admitting the Plaintiff to act, if he ſhould bring a Mandamus for that Purpoſe, and to have the Inſignia of the Office delivered to him; yet it cannot be a good Return to this Mandamus, which is only to ſwear him.

'Tis true, he hath already exerciſed the Office of Mayor, but that may be compared to the Caſe of a Copyholder, who enters before Admittance, yet he may be admitted afterwards; 'tis likewiſe true, that a Mandamus hath been denied to ſwear a Mayor after the * Year; but that was where he had no Right to hold over; and therefore could not be ſworn where his Right was determined, which is not this Caſe, for here was a Power by the Charter to hold over; therefore the Judgment of Ouſter (tho' entered generally) ſhould be conſidered as a Judgment quouſque, for the Ouſting a Man from a Liberty, or the Seiſing thereof is quite different from the Ouſting one from the officiating in an Office.

1 Inſt. 56.

* Sid. 33.

Beſides, a Mandamus gives no Right, but puts a Man into Poſſeſſion, which may be afterwards diſputed by every Man who hath a Right; and therefore a peremptory Mandamus was deſired.

Econtra.

It was argued for the Defendant, that all the Right of the Plaintiff muſt be loſt by this general Judgment of Ouſter; and in this Caſe the Election and Swearing being but one entire Juſtification, and one of them being found againſt the Plaintiff, Judgment final ſhall be given againſt him, and he ſhall not afterwards be admitted to claim any Right by Virtue of an Election precedent to ſuch Judgment, becauſe that Judgment hath extinguiſhed all his Right.

2 Roll. Rep. 46, 92. Raſt. Ent. 540. Co. Ent. 527, 537. 540, 559.

Now the Judgments, both in the Writ of Quo warranto, and in the Information in Nature of a Quo warranto are the ſame which appears in ſeveral Entries, and they differ only where the Party is ouſted from the Franchiſe, and where 'tis ſeiſed by the King; for where 'tis entered with a Salvo jure, there the Judgment muſt be againſt the King.

So unleſs the Plaintiff can ſhew ſome new Title, he hath no Right to be ſworn, nor can he be ſworn by Virtue of any right he claims by the former Election, becauſe all that Right is determined by this Judgment.

Curia.

The Queſtion is, If Pindar hath ſtill a ſubſiſting Right to enjoy the Office of Mayor, and that he hath not, the Defen-

dant returned on this Mandamus, the Conſtitution of the Corporation, and to chooſe a Mayor yearly, who was to act for a Year, and until another was duly choſen; they likewiſe return the Information, and the Judgment of Ouſter, and rely on the ſame, the Year being out; ſo that the principal Queſtion is, Whether this Judgment is a good Bar to him from being now ſworn.

'Tis true, it appears on the ſame Record, that Pindar was duly elected, tho' not ſworn; it ſeems, that by that Means he ſhould be precluded from this Office; but the Judgment given in this Caſe is the conſtant Judgment in ſuch Caſes, and the Court muſt take it to be good whilſt 'tis unreverſed; therefore taking it abſtractly, as the Court muſt do, without conſidering whether 'tis a proper Judgment, or not, 'tis as full an Amotion as can be, and therefore Pindar is entirely excluded whilſt this Judgment ſtands in Force; for which Reaſon a peremptory Mandamus was denied.

The King *verſus* Beecher & al'.

Mandamus to the Juſtices to ſign a Poor-Rate.

THIS was a Motion for a Superſedeas to a Mandamus to be directed to the Juſtices of Peace to ſign a Poor-Rate made by one Part of the Pariſhioners only, by which Rate Part of the Pariſh were not charged, upon Pretence that it was extraparochial; and there was another Rate made by the Majority of the Pariſhioners, by which that Part of the Pariſh not charged was thereby charged, which laſt Rate was ſigned by two Juſtices; ſo if this Mandamus ſhould be directed to them to ſign this Rate, it would contradict what they had already done by Signing the other Rate, which ought to be determined upon an Appeal, before a Mandamus ſhould be granted for the Signing another Rate, for otherwiſe there might be a double Appeal.

Curia.

The Court held, that if a Mandamus was directed to the Juſtices to ſign this Rate, it would not be contradictory to that which was already ſigned, nor to themſelves, becauſe the Conteſt is between the Pariſhioners in which the Juſtices are not concerned, therefore they ought to ſign this Rate, and not conteſt the Right, it being a Queſtion of Fact between the Pariſhioners, whether this Place not charged in this Rate, but charged by the other Rate, is extraparochial, or not, which is fit to be tried in a feigned Iſſue.

The

The King *verſus* Robinſon.

Mandamus to proceed to the Election of a Mayor.

MAndamus directed to the Mayor and Aldermen, &c. of, &c. to proceed to the Election of a new Mayor, who was to be choſen out of the Aldermen; the Return was, that there were no Aldermen, &c. And now the Court was moved for an Attachment againſt the Defendant, for that this was rather a Banter than a Return.

Curia.

If there are no Aldermen, yet an Attachment muſt not go, but the Plaintiff may have his Action for a falſe Return, or he may traverſe the Return, if falſe; ſo there is no Colour for an Attachment; but afterwards, upon farther Conſideration, a Rule was made to ſhew Cauſe, &c. for if it appears this was a frivolous Return, and purpoſely made to avoid the Juſtice of the Court, an Attachment ſhall go.

Anonymus.

Bail ſhall pay Intereſt from the Time the Judgment was had againſt the Principal.

THE Plaintiff obtained Judgment againſt the Principal for 2318l. which Judgment was conteſted by him ſo far as he could, even to an Affirmance in the Houſe of Lords, and afterwards the Plaintiff obtained a Judgment upon a Sci. fa. againſt the Bail; and the Queſtion now was, Whether they ſhould pay Intereſt from the Time the Judgment was had againſt the Principal; they offered to pay the principal Sum and Coſts; and it was inſiſted for the Plaintiff, that he ought to have the Whole, and the Court inclined to that Opinion.

The King *verſus* Chandler.

Indictment for Secreting a Woman big with *illegitimo Fœtu.*

THE Defendant was indicted, for that M. S. being with Child de illegitimo Fœtu, begotten by him (the Defendant) he ſecreted her ſo as ſhe could not be had or found to give Evidence for the Pariſh againſt him; to which Indictment the Defendant demurred, becauſe there cannot be an illegitimus Fœtus; and for that Reaſon the Defendant had Judgment, for every Fœtus is legitimate till born, for the Parents may marry before the Child is born; and if ſo, then the Child is legitimate.

The King *verſus* Trinity *Pariſh in* Cheſter.

TWO Juſtices made an Order to remove the Father and Mother, and John, Elizabeth and Sarah, their Children, from the Pariſh of, &c. to the Pariſh of, &c. and it was now moved to quaſh it, becauſe it did not ſet forth the reſpective Ages of the Children, for they might be Apprentices, or ſerve for a Year, and ſo gain a Settlement elſewhere; and for this Reaſon it was quaſhed as to the Children, but it was good as to the Father and Mother.

Order for removing Children, and did not ſet forth of what Ages they were, quaſhed.

The King *verſus* Nicholls.

A Motion being made for Leave to file an Information againſt the Defendant Nicholls, who was Mayor of Stafford, and a Juſtice of Peace, for his Neglect of publick Juſtice in denying a Warrant to the Proſecutor, who was beaten by T. S. a Rule was made to ſhew Cauſe, &c.

Information againſt a Juſtice of Peace for denying to grant his Warrant.

And now it was moved to diſcharge that Rule, becauſe the Mayor had ſeveral People then before him to be examined concerning a Riot which happened on that Day; and it being late at Night, he deſired them to come the next Day, which is the Denial of which the Proſecutor now complained.

And thereupon the Rule was diſcharged, becauſe the Mayor had done what Juſtice he could; and the Intent of the Procuring this Rule was to bring him into Diſgrace, and to inflame the Corporation againſt him; ſo the Proſecutor was ordered to pay the Coſts of the Motion.

Curia.

The King *verſus The Mayor of* Monmouth.

THIS was likewiſe a Motion for Leave to file an Information againſt the Defendant for Beating the Informer, who gave no other Provocation, than ſaying to him, who kept an Ale-houſe, Mr. Mayor, draw me a Pot of Drink; but it being the laſt Day of the Term but one, the Court would make no Rule to hang over a Magiſtrate's Head a whole Vacation, ſo ordered it to be moved the next Term, if they thought fit.

Information for Beating the Informer.

Swetnam *verſus* Archer.

Prohibition where the Suit was for Seats in a Church.

PRohibition to the Spiritual Court, where the Suit was for two Seats in the Parish Church of King's Norton; the Defendant pleaded, that she was in Poſſeſſion of two antient Meſſuages to which thoſe Seats belonged; which Plea being rejected by that Court, the Plaintiff now moved for a Prohibition, which was oppoſed, for that the Church was new-built by the Pariſhioners, and for that Reaſon there could be no Preſcription to the Seats, but that they were in the Gift of the Biſhop; ſo a Conſultation was prayed.

The Plea tendered by the Defendant was ſuch as could not be tried in the Spiritual Court, becauſe they cannot hold Plea of the Inheritance of the Seats, nor of any Thing which concerns the Freehold; ſo the Prohibition muſt ſtand:

And at the ſame Time there was another Motion for a Prohibition to the Spiritual Court, the Plaintiff being proſecuted there, for ſaying, He would not be of the Communion of the Church of *England*, upon any Conſideration, for he believed if he was, he ſhould be damned; and the Reaſon offered for the Prohibition was, becauſe the Libel was for a Contempt againſt the Common Prayer Book, whereas this was not ſuch an Offence.

Curia. The Court was of Opinion, that tho' 'tis not an Offence againſt the Common Prayer Book, yet 'tis certainly of Spiritual Cogniſance, therefore the Prohibition was denied.

Brown *verſus* Coombs.

An Attorney may be Bail.

AN Objection was made againſt the Bail in this Cauſe, for that 'tis againſt the Rule of this Court to take an Attorney Bail.

'Tis very true, there was ſuch a Rule, but the Intention of Making it was, that an Attorney ſhall not be taken as good Bail, meerly by his being an Attorney; but when he is reſponſible, and juſtifies, and is an Houſe-keeper, then, tho' he is an Attorney, he is good Bail.

The King *verſus The Church-wardens of* Rotherhith *in* Surrey.

Mandamus not granted to Church-wardens, &c. to make a Rate to reimburſe the old Church-wardens.

UPON a Motion for a Mandamus to the new Church-wardens and Overſeers of the Poor to make a Rate to re-imburſe the old Ones the ſeveral Sums by them expended

for the Maintaining the Poor the laſt Year, it was denied; it having already been reſolved in * Tawney's Caſe, that a Mandamus cannot be granted to the new Overſeers to make a Rate to raiſe Money to reimburſe the old Overſeers, but only to raiſe Money for the Relief of the Poor; for ſo is the Act of Parliament expreſly, and muſt be purſued, and an Overſeer is not bound to lay out Money till he hath it; if he doth, he muſt make a new Rate for Relief of the Poor, out of which he may retain ſo much as will pay himſelf.

* Salk. 531. 6 Mod. 97.

DE

Term. Sanct. Hill.

Anno 11 Georgii, 1725.

Strong *verſus* How.

THE Defendant who was an Attorney, had Deeds delivered to him by the Plaintiff, and gave a Note under his hand to redeliver them ſafe, whole and uncancelled to the Plaintiff upon Demand, which not being done, the Plaintiff moved for an Attachment againſt him, and obtained a Rule for the Defendant to ſhew Cauſe why that Writ ſhould not go.

An Attorney ordered to deliver Deeds, tho' not entruſted with him in his Way of Buſineſs.

Afterwards it was ſhewed for Cauſe, that theſe Deeds were delivered to the Defendant by the Order of his (the Plaintiff's) Brother to be laid before Counſel for his Opinion, and did not come to his Poſſeſſion as he was an Attorney in the Way of his Buſineſs; and that he delivered the Deeds to the Counſel, who delivered them to a Perſon who lent his

Brother 200l. on a Mortgage of his Estate, so that he (the Defendant) could not have them back again; and therefore the Court will not grant an Attachment for not returning them when 'tis impossible it should be done, especially since if the Plaintiff hath any Right to the Deeds, he may recover them in an Action of Trover, or by a Bill in Equity.

Curia. 'Tis an established Rule of this Court, that where-ever Deeds or Writings come to an Attorney in the Way of his Business, to compel him to redeliver them to the Person of whom he received them; for as he is entrusted with them, the Court will compel him to execute the Trust, he being subject to the Justice of this Court; and 'tis not material, whether he is an Attorney of this Court, or not, if he practises therein; and the other Courts have the same Power over the Attornies of this Court; and they have gone so far as to compel a Counsel to deliver up the Writings entrusted with him.

As to suing for them, it would be very inconvenient to put the Deliverer to a Suit either at Law, or in Equity; for he may not be able to defend his Possession for Want of them.

Whereupon the Rule was made absolute.

Bail where they are discharged upon the Surrender of the Principal.

Nota; The Practice of B. R. is, that where Judgment is obtained against the Principal, in such Case, the Bail may surrender him at any Time before the Return of the first Scire facias, where 'tis afterwards returned Scire feci, or at any Time before the Return of the second Scire facias, where two Nihils are returned.

And if the Plaintiff proceeds by Action of Debt on the Recognisance, the Bail may surrender the Principal within eight Days after the Return of the Writ.

Now the principal Case was an Action of Debt on the Recognisance against the Bail, and the Writ was returnable, the Essoin-Day of the Term, and the Principal was surrendered, and an Exoneretur entered on the Bail piece the fourteenth Day of January; so it was moved, that the Bail might be discharged, and they were discharged accordingly.

Matthias Cater's *Case*.

The Defendant was committed to *Newgate* for selling written Protections.

ON Thursday 4 Febr. 1724. one Matthias Cater, Gent. to the Earl of Suffolk, was by Order of the House of Peers committed to Newgate on Proof of his being guilty of procuring and selling written Protections, from and in the Name of that Peer, to several Persons, to the great Damage

of their Creditors, and in Breach of the ſtanding Orders of that Houſe; and was alſo found guilty of an unlawful Combination with others to charge falſly on their Oaths certain Perſons for ſpeaking ſcandalous and inſolent Words, reflecting on the Houſe of Peers, and was ſentenced to pay a Fine of twenty Nobles, to ſuffer three Months Impriſonment, and to ſtand twice in the Pillory; all which was done without any Trial by Jury.

King & uxor *verſus* Baſingham.

Aſſumpſit, &c. in which the Plaintiff declared for Money lent by the Husband and Wife, &c. and that it was not paid, ad damnum ipſorum.

Where Husband and Wife may declare *ad damnum ipſorum.*

After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was ill; for 'tis plain the Wife can have no Property in the Money of the Husband; beſides, by this Sort of declaring the Right would ſurvive to the Wife, whereas it ought to go to the Executors of the Husband.

2 Cro. 644.

'Tis true, where there is an expreſs Promiſe made to the Wife, for ſome ſpecial Act by her done, and where the Duty would ſurvive, they may declare ad damnum ipſorum; as where they declared, for that the Defendant was indebted to them for Work done by the Wife in making a Peruke for the Defendant; he promiſed to pay, but had not paid, ad damnum ipſorum; this was held well enough; but in Trover by Husband and Wife, in which they declared qd' cum poſſeſſionati fuerunt, &c. and that the Defendant had converted, &c. ad damnum ipſorum; this was adjudged ill after a Verdict, becauſe both the Poſſeſſion and Property was in the Husband.

Buckley *ver.* Collier. Salk. 114.

Nelthorp *ver.* Anderſon. Salk. 114. *See* 2 Cro. 77.

It was inſiſted for the Plaintiff, that if this Declaration can be ſupported by any Intendment, it ought to be made in Favour of the Plaintiff's Right after a Verdict; now this may be the Money lent by the Wife before the Marriage, and the Promiſe made to her and the Husband after Marriage.

Econtra.

Salk. 117. Yard *verſus* Ellard.

If this had been an Action of Covenant, on a Covenant made to them, it would have been good; and ſo it would in a joint Action brought by them for Rent on a Leaſe made to them, or in Action of Debt on a Bond made to them; ſo where the Wife paid a Marriage-Portion, and a Promiſe was made to her to repay it; and the Action was brought by her and her Husband; ſo where an Action on the Caſe was brought by the Husband and Wife againſt an Executor, upon a Promiſe made by his

Cro. El. 61. Sid. 25.

Hiſſiard *ver.* Hambridge. Allen 37.

his Teſtator after Coverture to pay 8l. per ann. to the Wife during her Coverture; after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Action ſhould be brought by the Husband alone, becauſe the whole Benefit was to him, for that the Promiſe was made ſince the Marriage; but adjudged that the Husband alone might bring the Action, or join his Wife.

Curia. The Court inclined againſt the Plaintiff, for it being laid ad damnum ipſorum made the Declaration ill; and ſo it was adjudged in 2 Cro. 479.

Myer *verſus* Yellop.

Attachment cannot be granted for a Reſcous before the Sheriff hath returned the Writ.

AN Attachment was granted upon Affidavits made againſt the Defendants for a Reſcous, and this was before the Sheriff had returned his Writ, which being contrary to the old Practice in ſuch Caſes, it was ſet aſide.

Read *verſus* Marſhall.

Where the Wife need not be joined with the Husband in the Action.

THE Plaintiff brought an Action againſt the Defendant for entring his Houſe, taking away his Goods, and for beating his Wife, and had Judgment by Default; and upon a Writ of Inquiry, the Jury gave 100 l. Damages; and now the Defendant moved in Arreſt of Judgment, for that the Wife ought to be joined in this Action.

2 Cro. 501, 502, 538. Ruſſell & ux' *verſus* Corne. Salk. 119.

To which it was anſwered, that Beating the Wife was only laid to aggravate the Damages, and the Court ſeemed to be of that Opinion.

Anonymus.

The Defendant was bound in a Bail-Bond in *Quadrant libris, &c.*

UPON a Motion in Arreſt of Judgment in an Action of Debt upon a Bail-Bond, wherein the Obligor was bound in quadrant libris, conditioned that T. S. ſhould appear on the Return of the Writ; the Objection was, that the Word Quadrant was inſenſible; 'tis true, if the Condition had been for Payment of Money, ſo that it might explain what was meant in the Bond, it might be good; but where the Bond is ſingle, or the Condition is for doing ſome collateral Act (as in this Caſe it was) which doth not explain what Sum is intended in the Bond, there 'tis void.

Cromwell *ver.* Grunſden. Salk. 462. 2 Lev. 166. 5 Mod. 281.

To which it was answered, that it may be well on the Roll; thereupon the Court staped all Proceedings till the Roll was brought in, and said, tho' the Condition of this Bond was collateral, yet the Bond being made according to * the Statute, by which 'tis enacted, that none arrested by Process, &c. in which the true Cause of Action is not expressed, and for which the Defendant is bailable by Virtue of the Statute † 23 H. 6. shall be forced to enter into a Bond, with Sureties for appearing, in any Sum exceeding 40 l.

* 13 Car. 2. cap. 2.

† 23 H. 6. cap. 10.

Now the Condition of this Bond being for appearing, &c. that may explain what is intended by the Word Quadrant in the Bond, (viz.) 40 l. according to the Statute.

Cotton *versus* Owen.

IN Replevin for Taking his Goods, the Defendant avowed, and justified the Taking Damage-feasant; the Plaintiff replied, that the Goods were there, &c. by Virtue of a Demise made to him by the Avowant himself, and that he entered and was possessed, &c. The Defendant rejoined, and traversed the Possession, but gave no Answer to the Demise set forth in the Replication to be made by himself, for which Reason the Plaintiff demurred, and the Defendant joined in Demurrer; and it was insisted for the Plaintiff, that since the * Traverse of the Possession was immaterial, and nothing said as to the Demise, the Plaintiff ought to have Judgment; and accordingly Judgment was given for him.

Where the Rejoinder did not answer the Replication.

* Hob. 81. 11 Rep. 10.

Perry *versus* Kirk.

IN an Action brought against the Defendant for Goods sold and delivered, but the Plaintiff declared in Assumpsit, and in his Declaration he laid several Counts, and also declared on a promissory Note.

Upon Non Assumpsit pleaded, the Parties were at Issue, and at the Trial of the Cause, the Counsel for the Defendant insisted on a special Agreement, and that the Defendant did not owe the Plaintiff any Thing at the Time of the Arrest; and for that Purpose he insisted, that the Plaintiff might produce this Note, for he only proved the Sale and Delivery of the Goods, whereas he ought not to proceed on that Count and no other.

A *Latitat* may be sued out before Cause of Action, but the Plaintiff cannot declare before the Cause of Action doth arise.

There-

Thereupon he produced the Note dated 18 April, 1724. which was for the Payment of 60l. and then the Counsel for the Defendant produced a Receipt under the Plaintiff's Hand, by which it appeared, that he (the Defendant) was to have six Weeks Time from the Date of the Note to pay this Money; therefore the Plaintiff cannot maintain this Action, because the Process against the Defendant bears Teste 18 May, so the six Weeks were not yet expired.

To which it was answered, that the Declaration was of Trinity-Term, which was above six Weeks after the Date of the Note, and that is the only Thing of which the Court ought to take Notice; for the original Process was only to bring the Defendant in Custodia Mareschalli, which may well be before the Cause of Action.

Curia. The Court held that to be the constant Difference; for the Plaintiff may sue out a Latitat before the Cause of Action, but he cannot declare till after the Cause of Action doth arise.

Ancell *versus* Sloman.

The Plaintiff who sued in *Forma pauperis* shall pay no Costs on a Nonsuit.

THE Plaintiff being admitted in forma Pauperis by this Court, brought an Action against the Defendant, in which he was Nonsuit, and was taken in Execution for the Costs of this Nonsuit, having an Estate fallen to him since; and now it was moved, that he might be discharged, because by the * Law, he who sues in forma Pauperis shall pay no Costs, but shall suffer such Punishment as the Court shall think fit.

* 23 H. 8. cap. 15.

Curia. The Court was of Opinion, that if the Plaintiff was a Pauper when the Cause was tried, he shall not pay Costs, and the Descent of Lands to him shall not have Relation to that Time; so a Rule was made to discharge him.

The King *versus The Officers of* St. Mary's *Parish in* Marlborough.

Mandamus to the Justices to make a Rate for the Relief of the Poor.

MAndamus to the Justices to make a Rate for the Support of the Poor of the Parish of St. Mary, &c. which was opposed, because the Parish-Officers ought to make the Rate, and the Justices are only to sign it; to which it was answered, that this Motion was grounded on that Clause in the Statute † 43 Eliz. by which 'tis enacted, that where the

† 43 Eliz. cap. 2.

Inhabitants of any Parish are not able to relieve themselves, Two Justices may tax other Parishes, &c.

Thereupon a Mandamus was granted, directed to the Justices; and as this is a Matter of Right, they ought to make a Return. Curia.

Phillips *versus* Doelittle.

A Lease was made reserving Rent; and for Non-payment thereof, that the Lessor might re-enter; the Rent was not paid, and thereupon the Plaintiff brought an Ejectment, and had Judgment; and now a Motion was made to stay the Proceedings upon Payment of what Rent is due, and all the Costs to this present Time; and thereupon a Rule was made, that the Defendant should go before the Master, &c. and he to take an Account of what Rent was due, &c. and that Proceedings should stay in the mean Time. In Ejectment for Non-payment of Rent; the Plaintiff had Judgment, but the Proceedings were stayed upon bringing in the Rent, and Costs, &c.

Afterwards it was moved to discharge this Rule, because it was made on an extraordinary Motion, for the common Motion is to stop Proceedings on Payment of what is due; now there can be no Proceedings after Judgment, to which it was answered, that tho' the Plaintiff had Judgment, yet this was a proper Motion where such Judgment was in Ejectment; and this intirely depends on the Rules of the Court.

The Court usually stays Proceedings in Ejectment on reasonable Terms at any Time before Execution executed; but in this Case it was ruled, that if the Defendant did not bring in to the Master within three Days, what Rent was justly due, and the Costs, that then the Plaintiff might take out Execution. Curia.

Martin *versus* Pritchard.

IN an Action of Debt on a Bond conditioned to pay 100 l. with Interest, on the 5th Day of December, &c. the Defendant pleaded, that he paid the Principal and Interest before the Original was sued out on the first Day of December; the Plaintiff replied Non solvit modo & forma, to which the Defendant demurred specially, for that Payment before the Day was no good Plea; and the Plaintiff joined in Demurrer. Where Payment before the Day is Payment at the Day.

And now it was objected against the Plea, that this was an immaterial Issue, which is very true, where the Day is made

* Holmes v. Brockett. 2 Cro. 434.

Part of the Iſſue; as for Inſtance; * Debt on a Bond, with a Condition to pay Money on the 25th of June; the Defendant pleaded, that he paid the Money on the 20th of June, which the Plaintiff denied, and ſo they were at Iſſue, and the Jury found, that the Defendant did not pay the Money on the 20th of June; adjudged this was a void Iſſue, having no Relation, and being quite out of the Condition of the Bond; for it might be, that he did not pay the Money on the 20th of June, yet he might pay it on the 25th, according to the Condition of the Bond; but if the Jury had found that he paid it on the 20th of June, it had been good, becauſe Payment before the Day is a good Payment at the Day; but Payment at any Day, before the true Day of Payment, is not a Payment at the Day.

Curia.

The Court cited the Caſe of Meriell *verſus* Joſlin, which was an Action of Debt on a Bond; the Defendant pleaded Payment before the Day; the Plaintiff replied, Non ſolvit modo & forma, (i. e.) Before the Day; and upon a Demurrer to that Plea it was held, that if the Iſſue had been found for the Defendant, it had been good, becauſe Payment before the Day is Payment at the Day; but if it was found for the Plaintiff, he could have no Judgment, becauſe Payment before the Day is no good Iſſue, for the Money might be lawfully paid on the Day; therefore, becauſe that Iſſue would not end the Matter, the Plaintiff might take Advantage of it by a Demurrer.

But in the principal Caſe, the Day is not made Part of Iſſue, for the Plea is, that the Defendant paid the Principal and Intereſt before the Plaintiff had any Cauſe of Action, (i. e.) Before the Original ſued out on the firſt Day of December; now, if thoſe Words had been left out, it had been a plain and certain Iſſue, and would have ended the Matter, whether found for the Plaintiff or the Defendant; and the adding thoſe Words ſhall not make it an immaterial Iſſue.

Parſons *verſus* Peacock.

An executory Deviſe to Two upon a Contingent of a third Dying in the Life-time of thoſe Two.

IN Replevin, the Defendant avowed for a Rent-Charge deviſed by his Grandfather to his Uncle, and his Heirs, which was now deſcended on him, this Avowant; the Plaintiff in his Replication confeſſed the Deviſe, but ſets forth a Clauſe in the ſame Will by which the Rent-charge was to ceaſe.

The Case was thus: ſſ. A. being ſeiſed in Fee, and having three Sons, deviſed Black-Acre to Giles his eldeſt Son, and to his Heirs, and White-Acre to Edward his ſecond Son, and his Heirs, and a Rent-Charge of fifty Pounds per Annum, iſſuing out of White-Acre to Roger his youngeſt Son, and his Heirs; Proviſo, that if either of his Sons ſhould die without Iſſue, living the other two, ſo as his Eſtate in Lands ſhould come to the other two Sons, then the Rent ſhould ceaſe.

Giles died, leaving Iſſue John Peacock the Defendant, and Roger died without Iſſue; ſo that this Contigency could never happen, becauſe Giles had Iſſue, and he being dead, and Roger likewiſe without Iſſue, their Eſtate in Lands could never come to two, where Edward alone was ſurviving; therefore the Rent-Charge muſt deſcend to the Defendant as Heir at Law, being the Son of Giles, the eldeſt Son of the Teſtator; for this is an executory Deviſe to two on the Contingent of one dying in the Life-Time of the other Two, which contingent muſt ariſe within the Compaſs of one Life, otherwiſe 'tis void; for 'tis plain, that the Teſtator intended this Benefit of Survivorſhip during his Sons Lives only.

And the Court being of that Opinion, Judgment was given for the Defendant.

DE
Term. Paſchæ,
Anno 11 Georgii, 1726.

Heavyſide *verſus* Davis.

5 Geo. c. 24. 6 Geo. c. 22. Bankruptcy in the Principal ſhall not avoid a Judgment regularly obtained againſt the Bail.

BY the Statute 5 Geo. 'tis enacted, That if the Commiſſioners ſhall certify to the Lord Chancellor, that the Bankrupt hath made a full Diſcovery of his Eſtate, and if four Parts in five in Number and Value of the Creditors ſhall ſign ſuch Certificate, and teſtify their Conſent to the Allowance thereof; and if 'tis allowed by the Lord Chancellor, then if the Bankrupt be taken in Execution, he upon producing ſuch Certificate allowed and confirmed, *&c.* ſhall be diſcharged by any Judge of that Court, wherein the Judgment was obtained.

In the principal Caſe, there was Judgment againſt the Defendant, who became a Bankrupt, and the Plaintiff did not come before the Commiſſioners to prove his Debt, but took out a Scire facias againſt the Bail; and after two Nihils returned, had Judgment againſt them, and they were taken in Execution.

And it was now moved, that they might be diſcharged, becauſe a Certificate of the Commiſſioners allowed by the Lord Chancellor is a Diſcharge of the Principal, who if he had been taken in Execution, would have been diſcharged upon producing it.

Curia. The Judgment againſt the Bail being regularly obtained, there being fifteen Days between the Teſte of the firſt Writ of Scire facias and the Return of the Second, and two Nihils returned, Bankruptcy in the Principal ſhall not be given

in Evidence to avoid ſuch a Judgment regularly entered againſt the Bail.

Griffith's *Caſe*.

DEBT upon a Bottomry Bond conditioned, that ſuch a Ship ſhould go from London to Burnos-Ayres, and return thither within eighteen Kalendar Months without any Deviation (the Danger of the Seas excepted,) and that then the Obligor ſhould pay ſo much Money, &c. within twenty Days after ſuch Return, or at the End of 18 Months, &c.

Where a Condition is in the Diſjunctive, and one Part of it falſified, the Plaintiff muſt have Judgment.

The Defendant in his Plea did not anſwer the Deviation, but pleaded, that the Ship did return within 18 Months, and that he paid the Money within 20 Days.

The Plaintiff did not demur to this Plea (as he might for not anſwering the Deviation) but replied and traverſed the Return of the Ship within 18 Kalendar Months, to which Replication the Defendant demurred, and the Plaintiff joined in Demurrer.

And it was now inſiſted for the Plaintiff, that the Condition being in the Diſjunctive, (viz.) to pay ſo much Money within 20 Days after the Return of the Ship, or at the End of 18 Months, the Defendant might have pleaded Performance of either Part of the Condition; and here he pleaded Performance of one Part, (viz.) That the Ship did return within 18 Kalendar Months, which being traverſed by the Plaintiff was confeſſed by the Demurrer; ſo that one Part of the Condition being falſified by this Demurrer, the Plaintiff muſt have Judgment; and by the Opinion of the Court, Judgment was given for him accordingly.

Anonymus.

THE Plaintiff, who was Tutor to two young Scholars in Cambridge, brought an Action on the Caſe againſt their Father; and declared upon an Indebitatus aſſumpſit to pay ſo much for his Salary for five Years, and nine Months, and upon a Quantum meruit, &c. and had Judgment by Default, and a Writ of Inquiry for Damages which was executed, and general Damages given; and now it was moved in Arreſt of Judgment, for that this Writ of Inquiry was executed the 4th Day of February; whereas the five Years and nine Months did not incur till the 20 Day of March following; ſo

Where a Writ of Inquiry was executed before the Money became due.

ſo that the Jury having given Damages generally, the Plaintiff cannot have Judgment for the Damages, for the Time not incurred, which he muſt have if he hath Judgment upon this Record; and the Court inclined to that Opinion.

Wilſon *verſus* Machin.

8 & 9 Will. cap. 17. Where Judgment is had againſt the Marſhal, the Profits of the Priſon ſhall be ſequeſtred.

BY the Statute 8 & 9 Will. 'tis enacted, That every Perſon obtaining Judgment againſt the Marſhal or Warden, *&c.* ſhall have their Profits or ſome Part thereof ſequeſtred towards the Satisfaction of the Debt with Coſts and Damages; but that Act was not to leſſen the Security for Money out of the Marſhalſhip of the King's Bench Priſon made by William Lenthall, Eſq; to Sir John Cutler, now veſted in his Executor Edmund Boulter.

The Marſhal having ſuffered an Eſcape, there was Judgment againſt him for 18000 l. and now a Motion was made in Behalf of the Creditor to ſequeſter the Profits of the King's Bench Priſon, towards the Payment of the ſaid Debt; which was oppoſed by the Aſſignees of Boulter's Mortgage; for that there was 14000 l. ſtill due to them for Principal and Intereſt; and that if the Plaintiff would diſcharge that Debt, he might take the Profits of the Priſon to ſatisfy his Debt.

Thereupon it was moved, that an Account might be taken of what was due on that Mortgage at the Time that Act was made, for it extends to no farther Sum than what was then due, and what Profits were received by the Aſſignees, or might have been received without willful Default; which was granted accordingly.

The King *verſus* Butler.

THE Caſe, ſt. One Hunt was Bailiff of the Corporation of White-Church in Hampſhire, in the Year 1722. at which Time Batchelor was choſen Mayor by the Jurors ſummoned by the ſaid Hunt; and then the Mayor continued Hunt Bailiff for the next Year, (viz) for the Year 1723. being the Year of his Mayoralty.

Thereupon an Information in Natute of a Quo warranto was granted both againſt the Mayor and Hunt, ſuggeſting that no Man could be Mayor or Bailiff there who was Non-reſi-

dent, and choſen by Non-reſidents, and that both the Mayor and Bailiff were Non-reſidents, and therefore had uſurped a Franchiſe.

And at the Trial a Verdict was found for the Mayor, that he was an Inhabitant reſident, and againſt Hunt, that he was not reſident; thereupon the Mayor named one Page to be Bailiff.

And now the Queſtion was, Whether the Mayor could name a new Bailiff, or whether one Neeve, who was Bailiff before this Mayor was elected, ſhould continue Bailiff, becauſe by the Conſtitution of this Corporation, a Bailiff duly elected is to continue in his Office for a Year, and until another is duly choſen, and Hunt was never duly choſen, becauſe he was Non-reſident; and this being a controverted Point, another Information, &c. was granted to try it.

Informations in Nature of a Quo Warranto may be brought (with Leave of the Court) at the Relation of any Perſon deſiring to proſecute; and this is by Virtue of the Statute 9 Annæ, the End of which Statute was to prevent frivolous and vexatious Controverſies, and therefore Informations were not to be filed without Leave of the Court; but the Queſtion in this Caſe ſeemed doubtful, and ſince 'tis controverted it ought to be tried. Curia. 9 Annæ, c. 20.

Phillibrown *verſus* Ryland.

THIS was a ſpecial Action on the Caſe brought by a Pariſhioner againſt the Defendant, for Shutting him out of the Veſtry, he having offered to come in and vote amongſt the Pariſhioners, in which Action the Plaintiff declared, that there was a general Summons for the Pariſhioners, &c. to meet at a Veſtry in ſuch a Room near the Church, and that every Pariſhioner who paid Scot and Lot had a Right to be preſent and vote at the Veſtry; that the Plaintiff was a Pariſhioner, &c. and paid Scot and Lot, and was coming to the ſaid Veſtry, but was ſhut out by the Defendant, ſo that he could not be preſent and give his Vote at the Meeting of the Pariſhioners, and conſulting for the Good of the Pariſh ad damnum, &c. Caſe againſt the Defendant for Shutting the Plaintiff out of a Room where the Veſtry was held, not good, becauſe he did not ſhew that he had a Right to enter into that Room.

The Defendant demurred ſpecially to this Declaration, for that the Plaintiff did not ſhew any ſpecial Damage by his being ſhut out; and the Plaintiff joined in Demurrer.

And it was argued for the Defendant, that an Action on the Caſe could not be maintained, without ſhewing ſome ſpecial Damage; and that where ſeveral have a Right in Common with

with others, the Law will not allow that one of them ſhall have an Action, becauſe this would create Multiplicity of Suits; as for Inſtance; where a Man ſtops up a Way, the Law will not allow an Action to be brought againſt him by one, without ſhewing ſome ſpecial Damage to himſelf; for the conſequential Damage which may happen by Stopping the Way, will not ſupport an Action.

So where the Cuſtom of the Manor was for the Copyholders to name their Succeſſors; and a Copyholder having named one to ſucceed him, the Lord refuſed to admit him, for which he brought an Action; but adjudged it did * not lie; for if one might bring an Action, every one might do the like; therefore to avoid Multiplicity of Actions, it was held that this Action would not lie.

* The chief Reaſon was, becauſe the Copyholder before Admittance had neither *Jus in Re* or *ad Rem.*

So where a Lord of a Manor brought an Action againſt the Vicar, for not celebrating the Sacraments in his Pariſh-Church; it was adjudged that it would not lie, becauſe the Right to receive them was in Common to all the Pariſhioners, and he had laid the Right in himſelf & in omnibus tenentibus ſuis, but it might have been otherwiſe if he had laid the Right in himſelf and Family; and the Reaſon why the Action would not lie is, becauſe the not Celebrating the Sacraments was an equal Damage to all the Pariſhioners, and therefore one alone ſhall not bring an Action; for if he might, it would multiply Actions, which the Law will not allow; beſides, the Plaintiff had a proper Remedy in the Spiritual Court.

† 5 Rep. 73. And all this was adjudged in † Williams's Caſe, which was an Action for a common Nuſance in the Highway; and it was held that it would not lie, becauſe it was unreaſonable, that any particular Perſon ſhould have an Action where the Damage was in Common to many; for if he ſhould, then every Man might have the like Action againſt the Defendant, and ſo he would be puniſhed many Times for the ſame Cauſe; but if one hath a more particular Damage done to him than another, in ſuch Caſe he may have an Action for that particular Injury, but not for a Nuſance, becauſe that is common to all People; and the Common Law hath appointed another Method to puniſh Offenders of that Nature, (viz.) By Preſentment at the Leet, or by Indictment.

So where an Action was brought by one of the Inhabitants of Littlebury againſt the Defendant, for not keeping up an antient Ferry-boat there, for them to paſs over the River toll-free; it was held, that this Action would not lie, becauſe the not Keeping up the Ferry-boat was a Damage to all People

who had Occaſion to paſs that Way; but the not paying Toll was an Eaſement to the Inhabitants of that Hill only.

So where the Plaintiff brought an Action for Stopping an Highway near his Colliery; it was held that the Action would not lie, for that it was the King's Highway, and the Plaintiff had only a Convenience to paſs, but no Right to the Way. Salk. 15. But this Judgment was reverſed in the Exchequer-Chamber.

But admitting this Action would lie, yet this Declaration is not good, becauſe the Plaintiff did not ſet forth any legal or preſcriptive Right in the Pariſhioners to meet at a Veſtry; 'tis true, he alledges that every Pariſhioner who paid Scot and Lot had a Right to be preſent and vote, &c. but that might be a voluntary Right, for the Pariſhioners are no Body Politick to take any legal or preſcriptive Right.

Beſides, the Plaintiff did not ſet forth, that the Pariſhioners had a Right to meet in this Room, and if they had no ſuch Right, then the Action will not lie for Shutting the Plaintiff out of that Room, for it may be in the Defendant's own Houſe, or in the Houſe of ſome other Perſon where the Plaintiff had no Right to enter.

As Treſpaſs will not lie for taking Goods from the Perſon of the Plaintiff, unleſs he ſhews that they were his own Goods, for they might be the Defendant's Goods for any Thing that appears to the contrary. Yelv. 36.

Neither did the Plaintiff ſhew, that the Right was in all the Pariſhioners, or that this was a Select Veſtry.

Thoſe who argued for the Plaintiff anſwered the Objections made by the Defendant's Counſel, (viz.) that this was damnum ſine injuria; and that the Plaintiff ſhould ſhew ſome ſpecial Damage to himſelf, &c. 'tis true, an Action will not lie for a Damage without an Injury; but it doth not follow from thence, that an Action will not lie for an Injury, without ſhewing ſome ſpecial Damage; for every Injury implies a Damage, which is fully proved by the Caſes in the Margin. Econtra.

2 Cro. 478.
1 Vent. 206.
2 Vent. 25.
2 Lev. 250.

As to that Objection, that this Action would not lie, for if it ſhould, there would be Multiplicity of Actions againſt one Perſon for the ſame Offence; all the Caſes cited on the other Side to that Purpoſe are, where there was * another Remedy to puniſh the Offender, either by Information, Preſentment, or Indictment; but in the principal Caſe the Plaintiff had no other Remedy but by this Action, for there was neither a Breach of the Peace, or any publick Nuſance.

* In the Caſe of *Aſhby* and *White*, all the Judges agreed, that the Plaintiff had a Right, but that his Remedy was elſewhere.

As to the Objection made to the Form of this Declaration, that the Plaintiff did not ſet forth, that he had a Right to enter the Room where the Veſtry was kept, that is anſwered by ſhewing, that there was a general Summons for the Pariſhioners

ners to meet on ſuch a Day, and in ſuch a Room near the Church; and admitting it to be the Defendant's Room, yet if he let it for that Day, 'tis then the Room of the Pariſhioners for that Day.

But if the Pariſhioners had any particular Right to a Select Veſtry, that Matter ought to be ſet forth by the Defendant in Pleading, which he had not done, but * demurred; and the Plaintiff had ſet forth a ſufficient Right at Common Law to entitle him to this Action; for he declares, that every Pariſhioner who paid Scot and Lot had a Right to be preſent and vote, &c. and that he was a Pariſhioner, &c. and paid Scot and Lot; and the Pariſhioners are a Body politick for that Purpoſe, and for many other Purpoſes; for by the Common Law they have a ſole † Right to raiſe Taxes for their own Relief, without the Interpoſition of any ſuperior Court.

* It was inſiſted, that by the Demurrer the Right of the Plaintiff was confeſſed; to which it was anſwered, that nothing was confeſſed but what was well alledged in the Declaration, but that this Declaration was ill.

† 1 Roll. 121. 1 Mod. 236. 2 Mod. 222. Gibſon's Codex 220. Salk. 165, 166. 5 Mod. 325.

They are a Corporation to make By-Laws for mending the Highways, and for making Banks to keep out the Sea, and for Repairing the Church and making a Bridge, &c. or any ſuch Thing which is for the publick Good; all which was reſolved in the * Chamberlain of London's Caſe; and by the Statutes 3 & 4 Will. 3. and 7 Annæ, they are made a Body politick to ſeveral other Purpoſes, as to tax and levy the Rate for maintaining the Poor, and to tax the Pariſh to make and maintain Engines for extinguiſhing Fires; and by the Statute 9 Georgii, they are made a Body politick for purchaſing Work-houſes to employ the Poor, and conſequently every Pariſhioner hath a Right to be preſent at their publick Meetings in a Veſtry.

* 5 Rep. 66. *See* 1 Mod. 194. S. P.

Curia. The Plaintiff cannot maintain this Action, becauſe he hath not ſet forth any Right which he had to come into the Room; but if he had ſet forth ſuch Right, the Action would have laid, becauſe, if he had a Right, he muſt have a Remedy to aſſert it, and he hath no Remedy but this Action, for there is no Breach of the Peace or Injury to the Publick, therefore no Indictment or Information can be good in this Caſe.

By the Common Law a Pariſhioner may have a Right to be at the Veſtry, and probably if he be diſturbed in the quiet Enjoyment of that Right, he may maintain an Action againſt the Diſturber; but then he muſt ſet forth a Right to enter the Room where the Veſtry was kept, for otherwiſe it may be the Room of the Defendant, where he hath no Right to come.

Therefore it was agreed, that if the Right to enter this Room had been well ſet forth, the Action would have been well brought; and this is proved by the Caſe of the Vill of Littlebury, where one of the Inhabitant brought an Action againſt the Defendant for not keeping up an ancient Ferry-Boat, which was an Injury to the Publick in general; but the Inhabitants of that Vill claiming to paſs toll-free, every one of them had a private Right to that Eaſement; and therefore any one might maintain an Action to aſſert that Right, ſo in the principal Caſe every Pariſhioner had a private Right to be preſent at the Veſtry, and vote; and therefore any one of them might have an Action againſt another for hindring him to be preſent.

But becauſe the Plaintiff had not ſet forth a Right in himſelf to enter into the Room; therefore upon that Point Judgment was given againſt him by the Court Una voce, and not upon the Merits of the Caſe.

Kent *verſus* Kerry.

IN Dower in the Common Pleas, wherein the Plaintiff declared for her Dower in three Meſſuages, and three Tenements, &c. there was Judgment by Default, and after a Writ of Enquiry of Damages, a Writ of Error was brought in this Court, and the Errors aſſigned were, that the Word Tenement was of ſuch an incertain Signification in the Law, that the Sheriff could not deliver Poſſeſſion of it; that by the concurrent Authorities in the Books, an * Ejectment will not lie of a Tenement for the Reaſon before-mentioned, neither can a Fine be levied of it.

Dower of 3 *Tenements* not good, for the Incertainty of the Word Tenement.

* March 96. Noy 86. 3 Leon. 28. 2 Cro. 125, 621. Cro. Car. 188. 5 Mod. 238.

Beſides, the Plaintiff did not ſet forth, that her Huſband died ſeiſed, for which Reaſon no Damages can be recovered by the Statute; and yet the Sheriff hath executed a Writ of Inquiry of Damages, and by Virtue of the Writ Habere facias ſeiſinam hath delivered to the Plaintiff Seiſin of ſuch an Houſe, &c. or ſo much thereof as is worth 10 l. per ann. which is void for the Incertainty.

The Counſel for the Plaintiff argued, that in Dower there was not ſo much Certainty required as in a Præcipe, for a Writ of Dower lies of a † Garden, Croft or Cottage, but if it did not lie of a Tenement; yet the Tenant coming in, and confeſſing the Action hath made it good.

Econtra.

† 8 H. 6. 3. Br. Dower 92.

'Tis certainly ſo, where the Defendant hath pleaded collateral Pleas to a Declaration where the Demand was not ſufficiently ſet out; this is proved by the Caſes in the * Margin, and by a late Caſe between Hedley and Williams in the laſt Term where an Adminiſtrator brought an Action, and did not ſet forth the Letters of Adminiſtration; yet the Defendant having pleaded non eſt factum inteſtati, that made the Declaration good.

* 2 Cro. 668. 682.

As to the Objection concerning Damages, 'tis very true, that the Plaintiff ought to have ſet forth, that her Husband died ſeiſed, &c. and that 'tis a fatal Error to omit it; but 'tis an Error for which the Judgment for Damages ſhall only be reverſed; for in Dower the Judgment is compleat before the Damages are recovered; 'tis like a † Quare Impedit, where the firſt Judgment is good by the Common Law without Damages.

† 5 Rep. *in* Specott's *Caſe, fol.* 57.

Curia. Where the Plaintiff is to recover the Thing in Specie, as in this Caſe, and makes a Demand of it in ſuch general Terms, ſo that 'tis not ſufficiently deſcribed, he can never recover; for 'tis impoſſible for the Court to give Judgment, or for the Sheriff to deliver Poſſeſſion upon ſuch a general and incertain Demand; and therefore this Judgment was reverſed.

Newland *verſus* Filer.

The Plaintiff as Adminiſtrator brought an Action in the *Debet* and *Detinet* againſt the Heir, this being a Fault in Form, no Advantage ſhall be taken of it, but upon a ſpecial Demurrer.

AN Adminiſtrator brought an Action of Debt in the Debet & Detinet againſt the Heir of the Obligor, and concluded his Declaration ad damnum ipſius the Plaintiff, &c.

Moor 566. Cro. El. 711. 2 Cro. 546. Lane 79. Stile 232.

After a Verdict for the Plaintiff upon nil debet pleaded, it was moved in Arreſt of Judgment, that the Declaration was ill; for that it was brought againſt the Heir in the Debet and Detinet, when it ſhould be in the Detinet only, and the Declaration was concluded ad damnum ipſius the Plaintiff, when it ſhould be in Retardationem Adminiſtrationis.

It was confeſſed on the other Side, that this was a Fault in Form, but that by Virtue of the Statute 17 Car. 2. it was cured by the * Verdict, and by the late Statute for the Amendment of the Law.

* 1 Lev. 224, 260. 1 Sid. 344.

Curia. The Statute for the Amendment of the Law, doth not relate to obſtruct this Judgment, for the Court are to proceed

to it, notwithſtanding any Default in Form, unleſs Advantage is taken of ſuch Fault upon a ſpecial Demurrer, which was not in this Caſe; therefore the Plaintiff had Judgment.

The King *verſus* Weſtbury.

THIS was an Indictment againſt the Defendant, for that T. S. and other Bailiffs, &c. did, virtute brevis Domini Regis de fieri facias, and a Warrant thereon, levy the Goods of M. G. and that the ſaid Defendant Weſtbury with others did aſſemble, and riotoſe & routoſe did reſcue the ſaid Goods, and aſſault and beat the Bailiffs, and ſo diſturbed them in executione brevis & warranti prædict'. Indictment for a Reſcous ſetting forth *quod cum virtute brevis, &c. de Fieri facias*, and a Warrant thereon, he levied the Goods, &c. and the Defendant reſcued them; this is ill, for the *Fieri facias* ſhould be ſet forth at large.

Upon Not guilty pleaded, it was found againſt the Defendant, and now moved in Arreſt of Judgment, for that the Fieri facias was not well ſet forth; for it was virtute brevis Domini Regis de fieri facias, without ſetting forth the Writ it ſelf, and without mentioning the Party's Name; then it ſets forth, that there was a Warrant ſecundum exigentiam brevis prædicti, and that the Defendant diſturbed the Bailiffs in executione brevis & warranti prædicti, which is ill; for if there was no Writ, there could be no Warrant, 'tis true this Indictment mentions a Writ, but 'tis not well ſet forth, and if ſo, the Warrant muſt fail; for the Court can never judge whether 'tis ſecundum exigentiam brevis, when no good Writ appears to be made.

This Writ is ſet out by way of Circumſtance only, quod cum virtute brevis, &c. but if there was none; yet the Warrant would juſtify the Bailiffs, or maintain this Indictment for the Wrong done. Econtra.

'Tis very true, the Bailiff may defend himſelf by the Warrant, but a Writ muſt be ſhewn to charge a Stranger, and this is the conſtant Difference in ſuch Caſes; and as this Caſe is, an Indictment would have laid for a ſingle Battery, but the Warrant it ſelf, and the Diſturbing another in the Execution of that Warrant both refer to the Writ, and that being not well ſet forth, thoſe Things which refer to it muſt neceſſarily fail, for which Reaſon the Judgment was ſet aſide. Curia.

The

The King *versus* Grey.

Where by a Surrender of a Charter, the Corporation is not dissolved.

AN Indictment was found at a Quarter-Sessions held in Colchester before the Justices of Peace for the County of Essex; and this was for a Nusance done there by the Defendant, by laying Pigs of Lead in the High-road, which Indictment being removed into B. R. by Certiorari, the Defendant pleaded, and set forth the Charter of King Charles II. by which this Borough was incorporated, and Power given to them to make Justices of Peace for the said Borough, and for them to hold their Sessions there, with a Clause in the said Patent, by which the Justices of the County were excluded from any Jurisdiction there; and that this Indictment was void, being found there before the Justices of the County, who had no Jurisdiction in the said Borough.

The King's Coroner replied, and set forth a Surrender of the said Charter granted by Car. 2. to this Corporation, &c.

The Defendant rejoined, and set forth the Letters Patent of King William and Queen Mary, by which all the Lands and Privileges of this Corporation were granted, restored, and confirmed to them in as large a Manner as at any Time they enjoyed before the Surrender.

And upon a Demurrer to this Replication, these Points were made.

(1.) Whether the King can by his Charter grant to certain Persons, in a certain Place, a Power exclusive of himself, so that at no Time afterwards he can administer Justice in the same Place; and if it should be admitted, that the King might grant such an exclusive Power or Jurisdiction, then whether he hath granted it by these Words in the Charter, (viz.) That the Justices of the County shall not enter the Borough, nec se inde in aliquo intromittunt, &c.

(2.) Admitting that such an exclusive Jurisdiction is granted by this Charter, then it ought to be claimed by the Mayor and Burgesses as such, and pleaded to the Indictment below immediately, and not in such Manner as the Defendant had pleaded it.

(3.) The chief Question was, Whether by the Surrender of the Charter made Anno 36 Car. 2. the Corporation was wholly dissolved; for if it was, then the Charter of King William by which the Lands and Privileges were regranted, is void, because it was to a Corporation not in Being.

As to the firſt Point it was argued, that this Charter granted anno 15 Car. 2. did not give excluſive Conuſance to this Corporation, for the Words are, that the Juſtices of the County ſhall not enter the Borough, nec ſe inde in aliquo intromittunt, that is, they ſhall not enter to exerciſe any Juriſdiction; but this doth not exclude them from entering to take Preſentments and Indictments for any Misdemeanors committed there; 'tis like the Grant of a Franchiſe to return Writs, but notwithſtanding ſuch Grant the Sheriff is not excluded.

So at the Beſt theſe are doubtful Words, and therefore ſhall never be intended to enlarge the Juriſdiction of this Corporation, ſo as to exclude the Juſtices of the County.

The ſecond Point was not much inſiſted on, becauſe if the Indictment was void, as taken coram non judice, then there could be no Occaſion of Pleading this excluſive Conuſance below and immediately; but ſuppoſing there ſhould, a Certiorari doth not make the Merits of the Plea worſe, for the Defendant hath done no Act to admit the Juriſdiction of the Juſtices.

Therefore this is not like a Claim of Conuſance, &c. becauſe in ſuch Caſe, the Act done is only to be avoided by Pleading ſuch Claim, and that in due Time, for otherwiſe Juſtice might be delayed by an untimely Claim.

As to the Third and chief Point, 'tis admitted by the Pleadings, that the Charter granted by King Car. 2. in the 15th Year of his Reign, was ſurrendered; and it was inſiſted, that by ſuch Surrender the Corporation was abſolutely diſſolved, and if ſo, then the Charter of King William and Queen Mary is wholly void, becauſe 'tis not a Grant of Creation, but of Confirmation and Reſtoring the Liberties of a Corporation which was not then in Being, and ſo could not take by ſuch Grant; and it ſhall never be taken for a Charter of Creation and Confirmation too, for that would be to a double Intent, which the Law doth not allow in ſuch Caſes. 1 Roll. Abr. 513.

Beſides, here are no Words of Creation, and therefore 'tis like that Caſe in the Year-Book 9 Ed. 4. 11. where the King granted an Office to T. S. but it was held, if this was not an Office before the Grant, it was not good, becauſe there were no Words of Creating this Office.

So if the King grants ſuch a Thing Inhabitantibus de Dale, this is void, unleſs they were a Corporation before the Grant, for the Reaſon before-mentioned.

It was argued to quaſh this Indictment as taken coram non judice, that by the Charter anno 15 Car. 2. an excluſive Econtra.

Juriſ-

Juriſdiction was granted to this Corporation, and that the Juſtices of Peace of the County had none there, for the Corporation-Men have the Authority of Juſtices within their Corporation; and the Juſtices of the County are not to enter, or in aliquo ſe inde intromittere.

20 H. 7. 6. Brook Abr. *Tit.* Patent 111. Crompt. Jur. 8.

And ſo is the Abbot of St. Alban's Caſe, where the King granted a Power to him to make Juſtices of Peace within the Borough of St. Albans, ita quod the Juſtices of the County of Hertford ſhould not intermeddle, in the ſame Words as in the preſent Grant; it was adjudged in that Caſe, that the Juſtices of the County were excluded; and that if they acted in the ſaid Borough, it was coram non judice, and by Conſequence void; and all excluſive Juriſdictions in Letters Patents are always in this Form of Words, and no Inſtance can be given to the contrary.

The Grant of the Return of Writs was a particular Franchiſe, and not parallel to this Caſe, becauſe it did not appear upon the Record, that the Sheriff was excluded, or that he had no Juriſdiction within that Liberty, and it could amount to no more than to exclude the Sheriff in Perſon.

'Tis true, the Sheriff, notwithſtanding ſuch Grant, may make a Return; but if he doth, 'tis an Injury done to him who had a Grant of that Franchiſe, for which he may maintain an Action againſt him.

As to the chief Point, that by the Surrender of this Charter, the corporate Body was wholly diſſolved, and therefore their Liberties could not be reſtored by the Charter of King William, becauſe there was no corporate Body in Being to take; it was argued, that the Corporation was not entirely diſſolved; 'tis true, by this Surrender all their Lands and Liberties were given up, but ſtill they had a corporate Capacity to take, &c.

But admitting that their corporate Body was entirely diſſolved, yet by the Grant of King William it appears, that he intended to re-inſtate them in the ſame Privileges which they had loſt, for he gave them the ſame Liberties by Way of Grant and Reſtitution; therefore this is not like that Caſe where the King made a Grant Inhabitantibus de Dale, for there he was deceived in his Grant, there being no Corporation before; and certainly where a Corporation is re-inſtated by a Charter, the King intended to give them a Capacity to take; and where his Intent appears, and no ſet Form of Words are requiſite for that Purpoſe in the Grant, there his Intention ſhall prevail.

5 The

The Court ſeemed of different Opinions in this Caſe, the Chief Juſtice being of Opinion upon the firſt Point, that the King might grant to others ſo as to exclude himſelf from adminiſtring Juſtice in the ſame Place afterwards, for he is the Fountain of Juriſdiction as well as of Juſtice, and may diſtribute it as he thinks convenient; and for this there is an expreſs Authority in the Year-Book 20 H. 7. Curia. 20 H. 7. 6. *See* Hardres 505.

Two other Judges laid no great Streſs on that Caſe, for it appears by Dugdale's Origines Judiciales, that there were but two Judges then in Court, who held that the King might grant by a Charter excluſive to himſelf; 'tis true, there can be no Inconvenience of Failure of Juſtice, if the King had ſuch a Power; becauſe, if 'tis miſuſed or abuſed, 'tis forfeited. Dalton 23. Lamb. 47.

And therefore three of them held, that the King might exclude himſelf by his Charter, which one of the Judges denied, for that he had ſtill a concurrent Juriſdiction which he had granted by Commiſſion to the Juſtices of the County, therefore 'tis not void as to Colcheſter, and good for the reſt of the County, but voidable only as to Colcheſter, and if ſo, there can be no Inconvenience in it, becauſe then the Corporation may claim their Right, and ſo may the Party grieved. Dalton 10.

As to the chief Point, Whether the very Being of the Corporation was deſtroyed by this Surrender? 3 of the Judges held that it was not, and compared it to the Surrender of a Deed, that the Eſtate was not thereby ſurrendered, therefore the Corporation was ſtill ſubſiſting, and had a Capacity to take, and by the Charter of King William did retake; and it would be very inconvenient if it ſhould be otherwiſe (that is) if they could give up more by a Surrender than they can take by a Regrant.

In the great Caſe of the City of London ſeveral learned Men were of Opinion, that a Surrender did not deſtroy the Being of a Corporation; this appears by the Surrender of Abbies in the Reign of H. 8. for it was not thought proper at that Time to reſt purely on thoſe Surrenders, but to have them confirmed by Act of Parliament.

There is a particular Proviſo in the Statute * 27 H. 8. that Corporations ſhall have the Power of making Juſtices of Peace as they had before, which Power is mentioned in the Statute † 22 H. 8. which Act is confirmed by the Statute 3 & 4 Ph. & Mar. and tho' the King is impowered by Act of Parliament to make Juſtices of Peace in the Counties; it cannot be inferred from thence, but that he may limit and abridge this Power to certain Precincts in the Counties. *Cap. 24. § 6. † Cap. 5.

One of the Judges held, that tho' barely by the Surrender of this Charter, the Corporation was not diſſolved, yet there were other Words in it, by which they gave up all the Liberties and Privileges which they then enjoyed, by which Words the very Being of this Corporation was diſſolved; and if ſo, then the next Queſtion will be, Whether it was reſtored by the Re-grant of King William.

For there is no Occaſion of any ſet Form of Words in Letters Patent of Incorporation, for the firſt and original Grants of them was to have Gildam mercatoriam, therefore by the Charter of King William, by which all the Lands and Liberties were granted, reſtored and confirmed to this Corporation, they were actually reſtored, and intended by the King ſo to be.

But this being a Caſe of great Weight, it was adjourned farther to be argued.

Morice *verſus* Lea.

The Indorſee brought an Action againſt the Drawer, upon a Note by which he promiſed to account with *T. S.* or his Order, for 50 *l.* Value received, and good. * 3 & 4 Annæ, cap. 9.

AN Action was brought againſt the Drawer by the ſecond Indorſee, upon a Note given in theſe Words, (viz.) I Promiſe to account with T. S. or his Order, for 50 l. Value received by me, &c.

After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this was not a good Note within the Statute of Queen * Anne; 'tis plain 'tis not within the Words of the Statute, for thoſe are, All Notes ſigned after the firſt of *Auguſt*, 1705, by any Perſon promiſing thereby to pay to another, *&c.* or Order, or Bearer, *&c.* ſhall be aſſignable, and the Drawee or Indorſee to whom the Money is payable, may maintain his Action for the ſame againſt the Drawer or Indorſor.

Now this Note is not negotiable, becauſe the Promiſe is not to pay Money, but to account, and in all promiſſory Notes the Drawer muſt be an abſolute Debtor, otherwiſe they cannot be negotiated; but in this Note he is not a Debtor originally, tho' he may be ſo when the Account is ſtated; ſo this may be between Merchant and Factor; and therefore if the Drawer had applied this Money as Factor to T. S. he might have avoided the Payment of the Money by that Means.

In the Caſe of Smith *verſus* Boheme, anno 1 Georgii, it was reſolved, that where one promiſed to T. S. to pay 70 l. or to ſurrender the Principal; this was not a Note aſſignable within the Statute, for it was not negotiable ab Origine, and ſhall never be made good by Conſequence.

It was ſaid on the other Side, that this was a good Note within the Statute, and if ſo, the Action is well brought by the Endorſee, 'tis true, 'tis not within the very Words of the Act of Parliament; but the Statute ought to be favourably conſtrued, becauſe it was made for the Advancement of Juſtice, and for the Eaſe and Benefit of Traders. Econtra.

'Tis like the Conſtruction which hath been made on the Statute of Waſte, where the Words are ex dimiſſione, but it hath been reſolved, that Eſtates ex proviſione legis, (viz.) Eſtates by the Curteſy, or in Dower, are within the Equity thereof.

Beſides, the Note it ſelf hath the Badge of a promiſſory Note, for 'tis to be accountable to T. S. or his Order, which Word * Accountable is not ſo very incertain, for 'tis laid in the Declaration upon an expreſs Promiſe; and therefore good after Verdict, eſpecially ſince the Statute doth not preſcribe any ſet Form of Words in which theſe promiſſory Notes are to be drawn. * Salk. 9. 139.

The Caſe of Smith and Boheme, and ſo likewiſe the Caſe of Appleby and Biddolph, where the Note was in theſe Words, I promiſe to pay to *T. M.* ſo much Money, if my Brother doth not pay it within ſuch a Time, in both which Cales Judgment was arreſted after a Verdict. Theſe are Authorities not applicable to the principal Caſe, becauſe the Drawer was not the original Debtor, but might be a Debtor upon a Contigency.

This Statute was made for the Eaſe of Trade, and 'tis a remedial Law, for which Reaſon it ſhall be extended as far as poſſible; therefore the Words in this Note by which the Drawer promiſes to be accountable to T. S. for 50 l. ſhall be conſtrued as a Promiſe to pay the Money, and the rather becauſe 'tis to be accountable to T. S. or his Order, but 'tis impoſſible for him to account with the Endorſee; therefore it muſt be to pay; beſides, this muſt be originally either a Debt, or a Truſt, and nothing appears in the Note to make it a Truſt; therefore it muſt be a Debt. Curia.

As to the Objection, that the Drawer may be a Factor, and might apply this Money for the Uſe of the Drawee, the Words in this Note will not make him a Factor, (viz.) I Promiſe to be accountable for ſo much Money, &c. for the Money muſt be received to account as well as the Promiſe made to account; therefore the Word Accountable in this Caſe ſhall be taken to pay; and the Difference is when 'tis to be accountable for ſo much Money Value received, and when it is Value received on Account, or to Account, or as per Account, as 'tis uſual between Merchant and Factor, or Lord

and Steward; and it would be dangerous to the Credit of thoſe Notes if this ſhould not be good; therefore Judgment was given for the Plaintiff.

The King *verſus Biſhop of* Cheſter.

Faculty granted by the Archbiſhop need not be ſubſcribed, regiſtered or enrolled by the chief Clerk of the Faculty, but by his Deputy.

ERROR of a Judgment in a Quare Impedit brought in the County Palatine of Lancaſter, againſt the Biſhop of Cheſter, for refuſing to admit one Peploe to the Wardenſhip of Mancheſter-College, upon the Preſentation of the King.

The Biſhop pleaded, that he claimed nothing but as Ordinary, and ſet forth that this College was founded by Car. 2. who appointed a Warden thereof, and that all ſucceſſive Wardens ſhould be Bachelors of Divinity, and that the ſaid Peploe was not a Bachelor of Divinity; therefore he (the Biſhop) could not admit him to be Warden; and upon Iſſue joined, whether he was a Bachelor of Divinity or not, the Cauſe was tried, and Evidence was given, that the Archbiſhop of Canterbury had granted a Faculty or Degree of Bachelor of Divinity to the ſaid Peploe inſtanter, which Faculties were grantable by the Archbiſhops of Canterbury for the Time being, by Cuſtom and Uſage immemorial, and this was confirmed to them by the Statute 25 H. 8.

25 H. 8. c. 21.

The Counſel for the Defendant tendered a Bill of Exceptions to this Evidence, which was over-ruled below; and thereupon a Verdict was found for the King, and now the Defendant brought a Writ of Error, and aſſigned theſe Errors following:

(1.) It did not appear that this Faculty was ſtamped, or that the Duty was paid at the Time it was enrolled in Chancery as it ought to be by Virtue of the * Statute 9 W. 3. therefore it not being ſtamped when enrolled, 'tis void.

* 9 & 10 Will. 3. c. 25.

(2.) This Faculty was not ſubſcribed and regiſtred by the Archbiſhop's Clerk of the Faculties, as required by the ſaid Statute 25 H. 8.

(3.) That it was not ſubſcribed and enrolled by the King's Clerk of the Faculties in Chancery, as it ought, becauſe he is empowered by the Statute to tender an Oath to the Perſon who hath obtained it; which Statute was made to reſtrain the extravagrant Grants of the Pope in thoſe Days; and therefore ſhould be fully and ſtrictly performed by the Clerks themſelves, and not by their Deputy-Clerks; and this muſt be intended by the Legiſlators, for otherwiſe this Act would have been penned as the Statute of Wills, or as the

Statute of promiſſory Notes, by which 'tis enacted, that the Signing ſhall be by the Parties themſelves, or by any other Perſon authoriſed by them; therefore this muſt be done by the Principal Clerks themſelves, and not by their Under-Clerks, for 'tis not aſſignable to them; and therefore this Faculty is void, eſpecially ſince there is a Proviſo therein, that it ſhall not be good till ſubſcribed and regiſtered by the Clerk of the Faculties in Chancery, which is in the Nature of a Condition precedent, and not to be ſigned or ſubſcribed by his Order.

(1.) To which it was anſwered by the Counſel on the other Side, and ſo reſolved by the Court, firſt, that the Stamp-Act was only to ſecure the Duty to the Crown; and not to take away any Evidence from the Parties; the Cauſe therein is, That if any Perſon ſhall write on Parchment or Paper charged with the Duties payable by that, * and former Acts, he ſhall forfeit ten Pounds, and that it ſhall not be given in Evidence till the Duty and Penalty is paid; and 'tis every Day's Practice, that upon Payment of the Duty and Penalty, the Writing is made good. Econtra.

* 5 & 6 Will. 3. c. 21.

(2.) As to the ſecond Exception, that this Faculty was not ſubſcribed by the Archbiſhop's Clerk of the Faculties, but by his Under-Clerk, when 'tis expreſly required by the Statute 21 H. 8. that it ſhould be ſigned by the Clerk himſelf, which is very true, but the Act is but directory, and 'tis not ſaid, that it ſhall be ſigned by the chief Clerk himſelf; ſo that this being ſigned by his Under-Clerk, and it being cuſtomary in this Office for the Under-Clerks to ſign Faculties, this Exception is of no Weight.

(3.) As to the third and chiefeſt Exception, that there is a Proviſo in the Faculty it ſelf, that it ſhall not be good, unleſs ſubſcribed and regiſtered by the Clerk of the Faculties in Chancery, it was held, that where a Man doth any Thing by the expreſs Order of another as it was done in this Caſe, 'tis as good as if done by himſelf; as where one expreſly orders another to ſign a Deed which the Perſon thus ordered, did afterwards ſign, this is good as one determinate Act; but where a Deputy doth any Thing by Virtue of general Deputation, it muſt be where a Deputy may be made by Law.

The Judgment was affirmed.

Steed

Steed *versus* Lateward.

Notice must be given upon a *Sciri fieri* Inquiry.

THERE was a Judgment by Default against the Testator, who died, and the Plaintiff brought a Scire facias against the Executor to shew Cause quare Inquisitionem non habet, &c. and afterwards the Writ of Inquiry was executed; and now it was moved to set aside the Execution thereof; for that the Defendant had no Notice given of executing this Writ of Inquiry till his Goods were taken in Execution.

The Court referred it to the Master of the Office, to enquire what the Practice was, whether Notice was necessary upon a Scire fieri Inquiry, and within a few Days afterwards the Master reported, that the Practitioners differed in Opinion; but that in the Case of Phillips and Biron, it was resolved, that Notice ought to be given to the Executor, and so it was in the Case of Copley *versus* Delony, Mich. 12 Annæ, and in the Case of Crawley *versus* Heyward.

Curia; Where Judgment in Ejectment was more than a Year's standing, it was formerly the Practice not to sue out a Scire facias, but on Debate, that Matter was otherwise settled; and so it was in the Cases before mentioned, for if Notice should not be given, it takes away the Benefit of Action, which the Defendant might have against the Sheriff; therefore Notice is necessary.

The King *versus* Tuck.

* 6 & 7 W. 3. cap. 11.

THE Defendant was convicted before a Justice of Peace upon the * Statute made against Prophane Cursing and Swearing; and upon a Motion to quash this Conviction, the Objections were as follow:

Objections to a Conviction for Prophane Cursing and and Swearing not allowed.

1. By the Statute, the Person convicted is to forfeit 2 s. for every Oath, if he is not a Common Labourer, Soldier, or Sailor; now it did not appear upon the Oath of the Informer, that the Defendant was a Gentleman, and neither a Common Labourer, Soldier, or Sailor.

(2.) It doth not appear by this Conviction of what Age the Defendant was, when he did prohanely swear; for by the Statute he must be above 16 Years old.

(3.) This

(3.) This Conviction is incertain, for after the Nature of the Oath is ſet out, the Witneſs ſwears, that the Defendant repeated it ſixteen Times, for which he is convicted to forfeit 32s. whereas a Repetition preſuppoſes a former Act done; ſo he ſwore ſeventeen Times; therefore the Conviction doth not agree with the Evidence.

The Court held, that it ſhall be intended the Defendant was of Age, and a Gentleman, if ſo charged by the Informer; and 'tis not neceſſary to aver, that he is not a Soldier, Sailor, or common Labourer, ſince he is charged with 2s. for every Offence; and as to the not Charging him with more than ſixteen Times, when it ſhould be ſeventeen Times Swearing, 'tis but giving one Oath free, and there muſt not be too much Nicety in theſe Convictions: In the Caſe between The King and Sparrow, the Conviction was quaſhed for not ſetting out the Oath. Curia. ante. 58

The King *verſus* Dr. Shippen *and others.*

IN a Prohibition, the Caſe was, Dr. Cockman and Dr. Denniſon were Candidates for the Maſterſhip of Univerſity College in Oxford, and the firſt was declared Maſter, but Dr. Denniſon, and the diſſenting Fellows of the College appealed to Dr. Shippen, the Vice-Chancellor, and others, as Viſitors; and thereupon it was ſuggeſted by Dr. Cockman in a Prohibition, that this College was founded by King Alfred, anno 872. as by ſeveral Inſcriptions in the College it doth appear, and that the Members thereof always commemorate that King in Preaching, and all other publick Acts, and that the Kings of England were always Viſitors of that College, and no other Perſon had any viſitatorial Power there. In a Prohibition the Queſtion was, who is Viſitor of *Univerſity College in Oxford.*

This Cauſe was referred to the Attorney and Solicitor General, and they were to report who was the Founder of this College; and they reported, that it was too difficult for them to determine after ſo long a Time, who was the Founder, and of greater Difficulty to determine, Whether the Vice-Chancellor was Viſitor; thereupon a Rule was made, that the Defendant ſhould ſhew Cauſe why a Prohibition ſhould not go.

Martin

Martin *verſus* Budgell.

After the Want of a Bill filed in ſuch a Term, and certified by the Chief Juſtice, a Bill ſhall not be filed of any other Term.

UPON a Judgment by Default, and a Writ of Error brought in Parliament, the Error aſſigned was thus: *ſſ.* Memorandum quod alias ſcilicet Termino Sancti Michaelis ultimo præterito coram Domino Rege apud Weſtm. venit T. S. &c. per Johannem Stone Attorn. ſuum & protulit hic in Curia dicti Domini Regis tunc ibidem Quandam billam ſuam, &c. when there was no ſuch Bill of that Term; and upon a Certiorari from the Houſe of Peers to the Chief Juſtice of the King's Bench, he certified that there was no ſuch Bill.

Whereupon the Plaintiff ſuggeſted a Bill of another Term, and moved the Court that it might be filed; and had Leave to move the Houſe of Lords for another Certiorari directed to the Chief Juſtice, that he might certify the Bill of that Term ſuggeſted; and that Houſe ordered, that the Plaintiff ſhould have Leave to ſue out another Certiorari, and allowed his ſuggeſting a Bill of another Term; and now he moved the Court for Leave to file a Bill of the Term as ſuggeſted, as Originals of another Term are allowed to be filed in the Court of Common Pleas.

In the Caſe of Walmſley *verſus* Corey, the Memorandum was allowed to be amended by the Bill; and this Motion being made to ſupport a Judgment given in B. R. which was affirmed upon a Writ of Error in the Exchequer-Chamber; and a Writ of Error now brought in Parliament, after a Bill in Chancery brought for Relief, and that Bill diſmiſſed, the Court ought to do any Thing in their Power, after all theſe Proceedings, to ſupport this Judgment, eſpecially ſince the Merits of the Cauſe are entirely againſt the Defendant; for otherwiſe he would have been relieved in ſome of thoſe Courts; and as the Declaration is but the Copy of the Bill, ſo the Bill may be taken from the Declaration.

In the Caſe of Calvert *verſus* Caſtilian, it was held and ſo allowed, that a Bill might be filed after the Want of it was aſſigned for Error, which ſhews, that a Bill may be filed at any Time.

Econtra.

The Counſel on the other Side ſaid, that the Motion was improper after it was certified, that there was no ſuch Bill of that Term; and that the Want of the Bill is a good Cauſe to be aſſigned for Error, appears by the Statute made for the Amendment of the Law, by which 'tis enacted, That Judgments by Default, *Nil dicit*, or upon Demurrer, ſhall not be reverſed, if

a Bill is duly filed, which ſhews, that if 'tis not duly filed (as it was not in this Caſe) ſuch Judgments ſhall be reverſed.

The Court of Common Pleas will not admit the Filing an Original after the Want of it is aſſigned for Error; neither will this Court admit the Filing a Bill after the Want of it is certified by the Chief Juſtice; if they ſhould, they ought to do it in all Caſes, and conſequently the Omiſſion of filing Bills will be cured, and then it will be ludicrous to aſſign the Want of them for Error.

'Tis true, this Motion might have been proper before the Chief Juſtice had certified that there was no Bill of that Term, for then the Court might indulge the Plaintiff to file another Bill, and that was the Caſe of Calvert *verſus* Caſtilian, but never after the Court hath certified (as in this Caſe) that there was no Bill of that Term, becauſe a Bill of any other Term will not warrant this Memorandum, which recites, that the Bill was of ſuch a Term; therefore there being no Bill of that Term, the Judgment ought to be reverſed.

'Tis admitted, that the Judgments in the Common Pleas are ſupported by Originals of former Terms, which is done and allowed by entring Continuances; but it doth not follow from thence, that the Judgments in this Court may be ſupported by filing Bills of any other Term than what is ſet forth in the Memorandum, for in the Common Pleas the Memorandum is general, without alledging it to be of any certain Term; but the Memorandum in B. R. is, that the Bill was of a Term certain, and by Conſequence cannot be warranted by a Bill of any other Term.

The Court ſeemed to be of Opinion, that the Motion was improper after the Want of the Bill certified; but that if it had been made before ſuch Certificate, the Court might have given Leave to file a Bill of another Term, to ſupport the Judgment already obtained. Curia.

The Caſe of the Pariſh of White-Chapel.

A Poor Man was hired for five Years to work at a Glaſs-houſe in the Pariſh of Ratcliff, from Six in the Morning till Eight at Night, but lodged every Night in the Pariſh of White Chapel; this Man was removed by an Order of two Juſtices from White-Chapel to Ratcliff; and upon an Appeal to the Seſſions the Order was quaſhed, the Court being of Opinion, that he was ſettled at White-Chapel, becauſe his Lying in that Pariſh ſhewed he was no Part of his Maſter's

Settlement of a poor Man ſhall be in the Pariſh where he ſerves and hath Wages, and not in that Pariſh where he lies.

Family at Ratcliff, for he might be Houſe-keeper where he lay, and by Conſequence might be removable, which a Servant is not, nor can a Journey-man gain a Settlement in the Pariſh where he works; beſides, it appeared by this Order, that he worked only in one ſpecial Work, and he might ſerve another after Eight at Night in another Pariſh; now both theſe Orders being removed by Certiorari,

The Court held, that where a Man ſerved and had Board-Wages, and lay out of his Maſter's Houſe in another Pariſh, he certainly gains a Settlement in the Pariſh where he lived and ſerved, and not in the Pariſh where he lay; ſo the firſt Order was affirmed.

Maddox *verſus* Taylour.

Where the Declaration ought not to be concluded with *ad damnum ipſorum.*

IN Treſpaſs for Breaking and Entring the Houſe of E. G. and taking the Goods of T. S. ad dampnum ipſorum; after a Verdict for the Plaintiff, and entire Damages, it was moved in Arreſt of Judgment, that this Action could not be maintained, eſpecially ſince the Jury gave entire Damages; for how can the Plaintiff, who had no Right to the Houſe, (for that was in E. G.) recover Damages for the unlawful Entry, or Damages for Taking the Goods in which he had no Property, for that was in T. S. and there is a Caſe in 3 Cro. where the Action was for entring the Cloſe of one, and taking the Corn of him and another, yet Judgment was arreſted; and ſo it was in this Caſe.

DE

Term. Sanct. Trin.

Anno 11 Georgii, 1726.

Phillips *verſus* Fiſh.

IN an Action on the Caſe for theſe Words, (viz.) Phillips hath ſtole my Hens, quorum quidem verborum propalatione non ſolum bonam famam ſuam amiſit verum etiam (the Defendant) procuravit illum (the Plaintiff) arreſtari pro felonia, and to be brought before a Juſtice of Peace, and detained for ſome Time in Cuſtody, &c. Caſe for ſcandalous, Words, and that the Defendant procured the Plaintiff to be arreſted for Felony,

and the Jury gave one Shilling Damages; the Plaintiff ſhall have full Coſts.

Upon Not guilty pleaded, the Plaintiff had a Verdict, and one Shilling Damages; and now the Queſtion was, Whether he ſhould have full Coſts; and it was inſiſted, that he ſhould have no more Coſts than Damages, for by the Statute 22 Car. 2. 'tis enacted, That in all Actions of Treſpaſs, Aſſault and Battery, and other Perſonal Actions, wherein a Judge ſhall not certify upon the Back of the Record, that a Battery was proved, or the Title of the Lands chiefly came in Queſtion, if the Jury find under forty Shillings Damages, the Plaintiff ſhall have no more Coſts; and this being an Action on the Caſe for Words, is a Perſonal Action, and the Jury having given but one Shilling Damages, the Plaintiff ſhall have no more Coſts. 22 & 23. Car. 2. c. 9.

It was argued for the Plaintiff, that in this Caſe full Coſts ought to be given, becauſe the Action is not only for Words, but the Plaintiff expreſly averred, that the Defendant procured him to be arreſted for Felony, which is a diſtinct Fact laid, beſides the Words, and not by Way of Aggravation; but if it was, there *Econtra* for the Plaintiff.

is no Case to prove that full Costs ought not to be given.

Curia. If a separate Fact be laid in Aggravation, and as a Consequence of speaking the Words, it might be doubtful whether full Costs ought to be allowed. In Trinity-Term, 5 Geo. in the Case between Pixton and Anderton, this very Point was debated, (viz.) Whether a Fact laid by way of Aggravation, which was only a Consequence of speaking the Words, should bring it out of the Statute, and entitle the Plaintiff to full Costs; and resolved, that where the Thing laid in the Declaration by way of Aggravation would bear an Action of it self independent of the Words, &c. in such Case full Costs should be given; and that 'tis the constant Difference in such Cases, that where the Words spoken are the very Gist of the Action, tho' other Things are laid by Way of Aggravation, there shall be no more Costs than Damages; for the Jury in such Case can have no Consideration in giving their Verdict what was laid by Way of Aggravation; but if the Action was founded on special Damages, there the whole should be under their Consideration.

If an Action is brought for scandalous Words, and a Fact is laid by Way of Aggravation, which would bear an Action it self without the Words, and the Plaintiff did not prove that Aggravation, but had a Penny Damages, should he recover full Costs? certainly he should not; for if he should, the Statute would be eluded, because every Man would lay some special Damages in his Declaration, and it can never appear by the Postea whether he proved it or not, or whether the Jury had any Consideration of the Fact laid by Way of Aggravation.

'Tis true, where a Trespass is laid with a Per quod, &c. as for Instance, per quod servitium, &c. or per quod consortium uxoris amisit, there whatever comes under the Per quod must be proved, otherwise the Plaintiff cannot have a Verdict, because that is the Gist of the Action; but in the principal Case the Action is founded on the Words spoken, and the Procuring the Plaintiff to be arrested for Felony is laid in a different Count, and the Defendant is found guilty generally; therefore the Court inclined that the Plaintiff should have full Costs.

Moor-

Moorfoot *verſus* Chivers.

Writ of Error ſued out, and allowed before the Execution was ſerved, is good, tho' the Defendant had no Notice of it.

UPON a Motion to ſet aſide an Execution, the Caſe was, that a Writ of Error was allowed about two of the Clock in the Afternoon, and about the ſame Time the Execution was ſerved; now it was inſiſted, that from the Time of the allowing the Writ of Error, the Hands of the Court are tied up, and if ſo, the Execution is irregular, and ought to be ſet aſide.

All which was admitted on the other Side, if Notice had been given of the Allowance of the Writ of Error before the Serving the Execution; otherwiſe 'tis regular; but here the Plaintiff in the Writ of Error did not give the Defendant any Notice, that it was allowed.

Curia.

The Court was of Opinion, that if the Plaintiff in Error could ſhew that the Writ was ſued out, and allowed before the Execution was ſerved, it muſt be ſet aſide, tho' the Defendant had not any Notice of it.

Welſh *verſus* Creagh.

Debt will not lie upon a promiſſory Note, but an *Indebitatus aſſumpſit*.

IN an Action of Debt on a promiſſory Note, the Defendant demurred to the Declaration; and the Queſtion was, Whether the Action of Debt would lie; it was ſaid, that it would not lie againſt the Endorſor, but that it would lie againſt the Drawer.

3 & 4 Annæ cap. 9.

Now by the Statute 3 Annæ, 'tis enacted, That all Notes ſigned by any Perſon, promiſing to pay to another, or Order, or Bearer, the Money mentioned in ſuch Note ſhall be conſtrued to be due and payable to ſuch Perſon to whom 'tis made payable; but tho' 'tis due and payable to the Perſon, a general Indebitatus aſſumpſit will not lie for it, for Want of a Conſideration; for a Bill of Exchange is only an Evidence of a Promiſe to pay, and is no more than nudum pactum, but a general Indebitatus aſſumpſit will lie againſt the Drawer, not upon the Cuſtom of Merchants, but for ſo much Money received to the Plaintiff's Uſe, and the Plaintiff may give the Note in Evidence.

Curia. 9 & 10 W. 3. cap. 17.

The Statute 9 W. 3. puts Inland Bills of Exchange upon the ſame Footing with foreign Bills, where the Money is recoverable by the Cuſtom amongſt Merchants upon the Signing ſuch Bills; and the Statute 3 Annæ puts promiſſory Notes

Notes on the ſame Footing with Inland Bills, and enacts, that the Aſſignee or Endorſee may maintain an Action againſt the Drawer or Endorſor, and recover Damages, &c. which ſhews that an Action of Debt will not lie, becauſe Damages are never recovered in Debt.

If the Plaintiff had not declared on the Note, which he had done in this Manner, (viz.) That the Defendant onerabilis fuit per notam, he ſhould have Judgment; but an Action of Debt was never known to be brought on a Bill of Exchange or Note; if he had declared on an Indebitatus aſſumpſit, he might have recovered in Damages; the Plaintiff had Leave to diſcontinue.

Vaughan *verſus* Evans.

The Defendant who lived in *London* was ſerved with Proceſs out of the Court of Grand Seſſions in *Wales*, and not appearing, his Lands were ſequeſtered, but a Prohibition was granted.

IN a Prohibition to the Court of Grand Seſſions in Wales, the Caſe was, One Evans had a Mortgage of Lands within the Juriſdiction of that Court which Lands were afterwards purchaſed by one Vaughan, as he pretended, and he got into Poſſeſſion by undue Means.

Then Evans the Mortgagee filed a Bill againſt him in that Court, and againſt another who lived within the Juriſdiction, but Vaughan lived in London, and was ſerved with a Subpœna there; and not appearing upon the Service of the Subpœna, the Plaintiff Evans procured a Sequeſtration of this Land, which lay within the Juriſdiction of that Court, and then, and not till then, Vaughan moved for a Prohibition.

And it was now argued, that it ought not to go, becauſe it was abſolutely neceſſary to make Vaughan a Defendant jointly with the other who lived within the Juriſdiction.

Beſides, the Court of Grand Seſſions being a Court of original Juriſdiction, though circumſcribed as to Place, and this being a perſonal Proceſs, may be as well ſerved in London, as the Proceſs of the Court of Chancery may be ſerved in Paris or Dublin, or elſewhere out of this Realm, or the Proceſs of the Court of Chancery may be ſerved here, which is done every Day.

'Tis true, that Court cannot iſſue an Attachment, or any other Proceſs for a Contempt out of their Juriſdiction, which may be a Reaſon for ſequeſtring the Lands within their Juriſdiction, until the Party ſhall obey their Proceſs; and this being the Method of ſuperior Courts, 'tis reaſonable the ſame Method ſhould be purſued in this Court of Grand Seſ-

ſions; and the Caſe of Tranter *v.* Diggan is no Authority againſt it, becauſe it did not appear in that Caſe, that the Plaintiff had any Lands within the Juriſdiction.

Then the Court demanded of the Counſel, why the Plaintiff did not diſmiſs his Bill in the Court of Grand Seſſions, and exhibit a new Bill in the Court of Chancery here.

To which it was anſwered, it would be very hard on the Defendant in this Prohibition ſo to do; for if he ſhould bring a new Bill here, they would plead the Proceedings below in Abatement of that Suit; beſides, if the Plaintiff below ſhould diſmiſs that Bill, he muſt not only bear the Expence of all thoſe Proceedings, but muſt likewiſe pay Coſts to the Defendant for a ſuppoſed wrongful Proceeding there.

Then the Court granted a Prohibition, and ordered the Plaintiff to declare on it, and that the Defendant might take Advantage of it either by Plea or Traverſe; but it ſeemed hard in perſonal Actions, to puniſh a Man not within the Juriſdiction of the Court; and 'tis ſaid in * Hutton, that it cannot be done.

* Hutt. Rep. 56.

Blackett *verſus* Finny.

UPON a Bill exhibited to eſtabliſh a Modus, the Plaintiff ſet forth, that this Modus was payable on, or about the 25th Day of April, &c. which is a void Modus, becauſe it muſt be payable on a certain Day, as was lately reſolved in the Caſe of Harriſon and Clerke.

A *Modus* payable on, or about ſuch a Day, not good; for the Day muſt be certain.

Beſides, 'tis laid diſjunctively in the Bill, (viz.) That the Pariſhioners of, &c. conſtantly paid, or ought to pay ſo much when it ſhould be conſtantly paid, and ought to pay, &c. then as to the Modus for Sheep, 'tis laid, that the Pariſhioners uſually paid 4 d. for every Score, and ſo pro rata, but doth not ſhew what they ſhould have paid for a leſs Number, in Caſe there were not ſo many as a Score.

The Defendant put in his Anſwer, and amongſt other Things admitted, that the Modus, as ſet forth in the Bill, was payable on, or about the 25th Day of April, &c. but the Plaintiff perceiving the Faults in his Bill, as before-mentioned, moved for Leave to amend, and cited the Caſe of Reynolds *v.* Rogers, where the Plaintiff ſuggeſted a Modus, but did not lay it payable on any certain Day, neither did the Defendant in his Anſwer confeſs any Day of Payment; ſo that no certain Day of Payment appearing, either in the Bill or Anſwer, the Defendant, who was Plaintiff in a Croſs-Bill, having

having laid it to be payable on a certain Day, it was held good.

Curia. This is a Case where an Amendment of these Things will not alter the Nature of the Proofs; and the Day being admitted by the Defendant in his Answer, 'tis reasonable, that on Payment of Costs the Plaintiff should amend, especially since his Right appears on the Pleadings; therefore it would be too rigorous not to give him Leave to amend, for in such Case the Decree must be founded on his Bill; and if his Bill will not support it, tho' a Day is confessed in the Defendant's Answer, he can have no good Decree.

Cowper *versus* Spencer.

An informal Issue may be amended, but not where no Issue at all is joined.

AFTER a Verdict for the Plaintiff, it was moved in Arrest of Judgment, for that no Issue was joined in the Cause, it being Et hoc petit quod inquiratur per patriam, then these Words should follow, & prædictus (the Defendant) similiter which were omitted.

Econtra. On the other Side it was said, that there is no Occasion for Amending this Issue, because the Appearance of the Defendant is entered on the Postea; besides, at the worst, 'tis only an informal Issue, and that is amendable.

Curia. 2 Cro. 502. In Indictments for Treason there is no Similiter entered, and this Court must be guided by Precedents, Whether 'tis in this Case amendable.

And at another Day the following Cases were cited, to shew that it was amendable, (viz.) In Fitzherbert, Amendment, fo. 32. an Action was brought against several, they all pleaded, and in the Replication one only joined in Issue by a * Dyer 160, 161. Similiter, and yet it was held amendable; and in * Dyer the Entry was, Et prædictus similiter, leaving out the Defendant, and it was held amendable; and in the Cases cited in the † 1 Roll. 200. Cro. Eliz. 752. Cro. Car. 435. † Margin, Mis-entries were adjudged to be amendable; and it was my Lord Coke's Opinion, that the Misprision of a Clerk in a Record may be amended; and in the Case of Davis *v.* Acherly, in an Action on three promissory Notes, the Defendant pleaded as to Two of them, that the Drawee Non indorsavit, and as to the third Non Assumpsit generally, Et prædictus (the Plaintiff) similiter; and after Verdict for the Plaintiff, he was allowed to enter his Judgment on the first Issue; therefore if any Amendment is necessary, it must be in this Case, especially since it is plain by the Postea, that the Defendant appeared.

In every material Iſſue joined, there muſt be a Verdict on one Side, otherwiſe there can be no Judgment, and the Plaintiff would now have Judgment for Damages on a Verdict found on an informal Iſſue, as he alledges it to be, but on no Iſſue joined, as the Defendant ſays; now there is a Difference between an immaterial and an informal Iſſue joined, and where there is no Iſſue at all joined; and the Caſes cited in the Margin are, where the Iſſues were informally joined; as where 'tis ſaid in the Entry Et prædictus defendens ſimiliter, where it ſhould be prædictus (the Plaintiff) ſimiliter, in which Caſe the Iſſue is tendered by the Defendant; but in the principal Caſe the Iſſue was tendered by the Plaintiff, and never joined by the Defendant; ſo there was no Iſſue at all, which ſeemed to the Court not amendable. Curia.

Turner *verſus* Moſſe.

WRIT of Error on a Judgment given in the Common Pleas in an Action on the Caſe; the Error aſſigned was, for that there being but one Defendant, the Plaintiff had declared Pro eo videlicet quod cum ipſi idem the Defendant, &c. inſtead of ipſe idem, &c. Where a Word is Surpluſage.

But the Judgment was affirmed, for the Word Ipſi is but Surpluſage; and if it had been left out, the Declaration would have been good without it. Curia.

The King *verſus* Venables.

TWO Juſtices made an Order to ſuppreſs an Ale-houſe, and being informed that the Defendant ſold Ale afterwards, they made another Order, reciting the Firſt, (viz.) By which he was ordered not to ſell any more Ale; and that it now duly appeared to them that he had ſold Ale ſince that Time, therefore for not obeying the former Order, they by this Order committed him for three Days, without Bail or Mainprize, and until he entered into a Recognizance not to ſell any more Ale. Order to ſuppreſs an Ale-houſe, 'tis neceſſary that the Party ſhould be ſummoned, but not neceſſary to ſet forth the Summons in the Order.

And now it was moved to quaſh this Order; the Exception to it was, becauſe it doth not appear in the Order, that the Defendant was duly ſummoned, ſo had no Opportunity to defend himſelf; for if he had been ſummoned he might have ſhewed ſome Cauſe againſt the Making this Order; as for Inſtance; he might have a License from other Juſtices to ſell Ale in the mean Time.

Besides, this is not an Order to carry the former Order into Execution, but an Order depending on a Fact subsequent to the first Order; and natural Justice requires, that the Defendant should be summoned and heard before he is condemned; and so it was held in the Case of The * Queen *v.* Dyer, which was a Conviction on the Statute for † imbezilling Yarn, setting forth, That whereas Complaint had been made to T. S. and E. G. &c. and whereas the Defendant was duly summoned to appear before them, and by Virtue thereof did appear on Tuesday the 17th Day of April, whereas the 17th Day of April was on a Friday, and for that Reason the Conviction was quashed; for it was held, that a Summons was necessary, and that the Time to appear upon such Summons was impossible, because there was no such Day as Tuesday the 17th of April, therefore it was as if there had been no Summons at all; and in the Case of The Queen and Green, 12 Annæ, it was set forth, that the Defendant was summoned, but did not say How: And since this is a Matter from which no Appeal can be made, it would be hard to tie the Defendant down by this Order.

* Salk. 181.

† 7 Jac. 1. cap. 7.

Econtra. It was argued against the Defendant, that in Convictions of this Nature 'tis never necessary to set out, that the Defendant was summoned.

There is a Difference between judicial and ministerial Acts, for in the one, all Things shall be intended regular till the contrary appears; now, the Suppressing an Ale-house is a judicial Act, for by the Statute the Justices of Peace have a judicial Power to suppress them ad libitum, and therefore the Court will intend that the Defendant was duly summoned; but in ministerial Acts 'tis otherwise, for in such Cases all must appear to be right, and nothing shall be so by Intendment; as for Instance; in the Return of a Mandamus all must appear to be regular, because the Returns are made by ministerial Officers.

Curia. If the Defendant was never summoned, 'tis a Misbehaviour of the Justices who made the Order, for which an Information will lie against them; so that if that Fact is true, the Defendant hath a proper Remedy; now the Question in this Case is not, Whether a Summons is necessary, for it cannot be doubted but that 'tis necessary; but the Question is, if 'tis necessary to set it out in the Order; and it was held that it was not; and so the Order was affirmed by the whole Court.

The

The Mariner's Caſe.

LIBEL in the Court of Admiralty for Mariners Wages, the Plaintiff ſuggeſted for a Prohibition, a Contract reduced into Writing for the Wages; but the Prohibition was denied, for the Court always indulges Mariners to ſue in the Admiralty, becauſe by the Courſe of that Court, many of them may join in the Suit, and 'tis the cheapeſt and moſt expeditious Method to recover their Wages; if there is any ſpecial Contract as is now ſuggeſted, the Defendant may plead it in that Court; and if they do not allow that Plea, then it may be a proper Time to move B. R. for a Prohibition; for if it ſhould be granted before the Plea is diſallowed, 'tis a Prejudging the Juſtice of that Court.

Libel for Mariners Wages, a ſpecial Contract was ſuggeſted; but a Prohibition was denied to the Court of Admiralty.

Beach *verſus* Hobbs.

IN this Caſe it was ruled by the Court, that to leave a Declaration in the Office before the Eſſoin-Day of the Term is a compleat Delivery thereof, if Notice is given in Writing to the Attorney on the other Side, and he refuſes to pay for the Copy; but all Attornies ought to deliver a Copy of the Declaration to the Defendants Attornies where they are known, and willing to pay for it; but if not known, or refuſing to pay for it, then it muſt be filed in the Office before the Eſſoin-Day of the Term, and the Attorney for the Defendant muſt have Notice of it before the Eſſoin-Day, otherwiſe he ſhall have an Imparlance of Courſe.

To leave a Declaration in the Office before the Eſſoin-Day is a good Delivery.

Anonymus.

IN Replevin the Defendant juſtified the Taking the Cattle Damage-feaſant, and now moved to ſtay Proceedings on bringing into Court what was due with Coſts.

If you bring in what is due upon the Replevin Bond, Proceedings ſhall be ſtayed, but if 'tis to ſtay Proceedings on Payment of what is due for Damages, it ſhall not be granted, becauſe the Court hath no Rule to guide them in ſuch Caſe; but 'tis otherwiſe for Rent, for that is certain.

In Replevin the Court will not ſtay Proceedings upon bringing in what is due for Damages.

Curia.

Cambridge *verſus* Lea.

False *Latin* cured by a Verdict.

ERROR on a Judgment in an Action brought on a Policy of Inſurance, and the Error aſſigned was, for that after the Plaintiff had ſet forth, that the Ship was laden with Goods, and bound from ſuch a Place to ſuch a Place, and inſured, that Navis prædicta & bona prædicta ſubmerſa fuit, whereas the Goods only, and not the Ship, were inſured.

Curia.

This being only an Inſurance on the Goods, nothing could be given in Evidence at the Trial but the Loſs thereof, without which Evidence the Plaintiff could never have a Verdict; and as to the Word fuit, 'tis only falſe Latin, and cured by the Verdict; ſo the Judgment was affirmed.

Moor 898. 1 Vent. 114.

The King *verſus* Harwood.

No good Return to a *Mandamus* to ſwear a Churchwarden.

A Mandamus was directed to the Archdeacon of, &c. to ſwear T. S. Church-warden of the Pariſh of H. who returned that T. S. non fuit electus, and this being adjudged no good Return, it was now moved for a peremptory Mandamus.

* The King *verſus* the Archdeacon of *Cardigan*, 8 W. 3. *See* 6 Mod. The King *ver.* White. Mich. 11 Geo.

And that it was no good Return, the Caſes in the * Margin were cited.

Econtra.

It was admitted on the other Side, that where a Mandamus iſſues to a proper Officer who hath a Power to ſwear the Perſon elected, this is not a good Return, and the Caſes cited by the Plaintiff, were where Perſons were elected by Virtue of a Cuſtom, and the Officer refuſed to ſwear them, becauſe he would not make himſelf a Judge of the Cuſtom, but in this Caſe the Return is poſitive, that the Perſon was not elected, ſo the Fact is denied; and if 'tis true, then 'tis criminal to ſwear one into this Office, when he hath no manner of Right, for which Crime an Information will lie.

The Court held, that unleſs Cuſtom varies the Caſe, thoſe Authorities cited on the other Side are Authorities in Point; ſo a peremptory Mandamus was granted.

The Case of Wivel *and* Stapleton. *Vide ante* 68.

THE Judgment of Reversal given in B. R. in this Case was afterwards reversed in the House of Lords; For that the Residue of the Money was not due to the Plaintiff until he had made a good and legal Tender of the Stock, and the Defendant had made Default; and the Plaintiff having not shewn this in his Declaration, it was adjudged he had not laid a sufficient Breach therein. Afterwards the Plaintiff brought another Action, and therein laid a proper Breach, and the Defendant pleaded the former Record in Bar, to which the Plaintiff demurred. Sed quære quid inde venit.

Baggot *versus* Oughton. *Vide ante* 249.

AFTER the Death of Lord Chief Justice Prat, this Cause came once more to be argued; and the whole Court were of Opinion, that the Lease of the Mansion-house and Demesns was void, which Opinion was on Argument affirmed by the Lord Chancellor, and by him decreed accordingly, and that Decree affirmed in the House of Lords upon an Appeal.

Pasch. 11. Geo.

Colvin *versus* Fletcher. *Ante* 43.

PER Cur. This being a Plea in Abatement after a general Imparlance, let the Plaintiff have Judgment nisi causa on Saturday; and then 'twas moved to set aside the Rule, for that several Precedents of such Pleas are in Rastal's Entries.

Cur. If there be, it must be of Pleas pleaded puis darien Continuance; and this being in Disability of the Person, may accrue after a Continuance: But there is another Objection to this Plea; for they demand Judgment generally, and not quod responderi non debet quousque.

So that neither the Commencement nor the Conclusion is good; and so is Littleton, that such Pleas should be certain, &c. But if you think you can make any thing of it, let it go over to Trinity-Term. Co. Litt. 303.

And then 'twas urged, That (the Plaintiff being lately dead) the Suit abated.

Cur. There was Judgment nisi, so the Rule must be made absolute.

Term. Trin. 12 Geo.

Cowper *versus* Ginger. *Ante* 316.

THIS Cause came again to be heard, and the whole Court agreed, That Error coram vobis lay, and said that in the

Caſe of Walker and Stokoe, a third Writ of Error was brought, whereon it was ſo adjudged. And ſo is Fitz. Abr. Falſe Judgment 1. Bro. Abr. Falſe Judgment 1. 3 H. 6. 26. Yel. 6.

Warren *verſus* Conſet. *Ante* 106, 323.

IN Eaſter Term, 13 Geo. 1. The Judgment of C. B. was affirmed in B. R. by the whole Court. For that the Action being founded on the Articles, and the particular Facts being but auxiliary to the Deed, the Plea of Nil debet was no good Plea.

Term. Paſch. primo Georgii 2.

Shaw *verſus* Weigh. *Vide ante* 253.

The Reſolution of the Court on a Caſe by Deviſe.

RAYMOND Chief Juſtice. This Caſe ſtands for the Opinion of the Court. The Term made to the Plaintiff in Ejectment is expired; and though we can't reſtore the Party to his Poſſeſſion, yet we may give Judgment. The Judgment upon this ſpecial Verdict below was, quod querens nil capiat per breve, and we are all of Opinion that this Judgment ought to be reverſed.

The firſt Point before the Court is, What Eſtate the Truſtees have by the Will, as no Words of Inheritance are made uſe of in the Limitation to them.

And we are all of Opinion, that the Truſtees took an Eſtate of Inheritance by Implication; for the Intention of the Teſtator was, they ſhould take ſuch an Eſtate as would ſupport the ſeveral Truſts in the Will; and they being Eſtates of Inheritance, the Truſtees muſt have an Eſtate of Inheritance to ſupport ſuch Truſts, as 1 Roll. Abr. 611. but this being given up on the firſt Argument, we need not labour it.

The ſecond Point is, What Eſtate the Teſtator's Siſters, Dorothy and Anne, took by the Will: If they took an Eſtate Tail, Dorothy might levy a Fine, and ſuffer a Recovery to bar the Leſſor of the Plaintiff, and conſequently the Judgment below would be good; but if the Siſters took only an Eſtate for Life, the Fine and Recovery were a Forfeiture of the Eſtate, and no Bar to the Leſſor of the Plaintiff.

And we are all of Opinion, that the Siſters took only an Eſtate for Life, with Remainders in Tail to their Iſſues. For firſt, After the Death of his Wife, the Teſtator gives it in Truſt for Anne and Dorothy, equally betwixt them, during their natural Lives. Here if it had reſted, it would be an expreſs Eſtate for Life to them: And then he declares his Intention by ſaying, They ſhall commit no manner of Waſte Now can it be ſaid he intended them an Eſtate of Inheritance, when he obliges them not to commit any Waſte? But to proceed; He provides that if the 500 l. or any Part be paid by his

ſaid Siſters, that then they may raiſe ſuch Money by digging of Coals only; ſo that he reſtrains their Power to Digging of Coals only: And the Power his Wife had was to ſell, or cut and ſell Timber, or dig Coals, &c. But no ſuch Power is given to the Iſſues, becauſe it is plain he intended the Siſters ſhould take an Eſtate for Life, and the Iſſues an Eſtate in Tail; ſo there was no Occaſion to give them a Power which they had by Virtue of the Eſtate given them.

Then the Will goes on (and if either of my ſaid Siſters die, leaving Iſſue or Iſſues, &c. then in Truſt for ſuch Iſſue or Iſſues of the Mother's Share, or elſe in Truſt for the Survivor or Survivors of them). The Queſtion upon this is, Whether Iſſue or Iſſues are Words of Limitation, or a deſignatio perſonæ. At Common Law, Iſſue is not a Word of Limitation in Deeds, Coke 2 Inſt. 334 and in Caſe of an Uſe, the ſame Law; for if a Feoffment is made to the Uſe of J. S. and his Iſſue Male, this doth not paſs an Eſtate Tail: But in Wills (Iſſue) is ſometimes a Word of Limitation, and ſometimes a Word of Purchaſe, according as the Teſtator's Intention appears in the Will.

The Caſe of Loddington verſus Kime, in 3 Lev. 431. is not well reported. I heard it argued ſeriatim, and the Caſe was adjudged, That Jvers Armin took only an Eſtate for Life, and that Point remained unſhaken in Chancery and the Houſe of Lords, ſo that Iſſue there was judged a good Word of Purchaſe, though an Eſtate for Life was given to the Father of the Iſſue.

The Caſe of Blackhurt verſus Wells, Hill 12 Annæ is a ſtrong Caſe; there the Deviſe was to A. for Life only, and after his Death to his Iſſue, and the Heirs of ſuch Iſſue; and that was adjudged an Eſtate for Life in A. and the Iſſue was a Word of Purchaſe, though A. took an Eſtate for Life; and what the Court moſtly relied on in that Caſe, was the Intention of the Teſtator appearing from the Words only, and the Limitation over to the Heirs of the Iſſues.

Now here the Intention appears as plainly, that the Siſters were to take an Eſtate for Life only, as I have partly ſhewn; then the Words Survivor or Survivors ſhew the Iſſue were to take by Purchaſe, for Survivors can't relate to Siſters, there being but two. And the Will goes further (and their reſpective Iſſue or Iſſues) ſo that the Iſſue of the Siſters were to take an Eſtate which was to deſcend to their Iſſues; and when an Eſtate for Life is given to one, and after to his Iſſue, with a Limitation over to the Iſſue of ſuch Iſſue, the firſt takes only an Eſtate for Life, and the Iſſue take as Purchaſors. The Caſe of Clerk verſus Day, reported in Cro. Eliz. 313. 1 Rolls Abr. 832 & Moor 593. is to that Purpoſe; yet I doubt none of theſe Books have ſtated it as it is on the Roll, yet Moor is the laſt, and ſays it was adjudged, and he is a judicious Reporter; the other two were young at that Time; but as in Moor, the Teſtator deviſed to his

Daugh-

Daughter for Life, and if ſhe marry after my Death, and have Iſſue of her Body, &c. then I Will that her Heir after my Daughter's Death ſhall have the Land, and to the Heirs of their Bodies begotten: And it was adjudged that the Daughter took only an Eſtate for Life, and her Heirs an Eſtate of Inheritance by Purchaſe.

The Caſe of King verſus Melling reported in 2 Lev. and 1 Vent. has been ſtrongly relied on for the Defendant. That Caſe I agree is eſtabliſhed, but there is no Occaſion to carry it one Jot further; and we are of Opinion it does not come up to this Caſe; there is not a Limitation over (as in this Caſe) to the Iſſues of the Iſſue: And if Hale's Opinion is truly reported in that Caſe, he is clear of Opinion, if there had been a Limitation over to the Iſſues of the Iſſue, the Deviſee had taken only an Eſtate for Life, and the Word Iſſue had been a Word of Purchaſe.

Another Objection is, That if the Siſters do not take an Eſtate Tail by the Words already mentioned, yet they are Tenants in Tail by the ſubſequent Words, viz. And if my Siſters die without Iſſue, and their Iſſue or Iſſues die without Iſſue, then, &c. Theſe Words, they ſay, give them an Eſtate Tail by Implication, as in the Caſes of Sutton verſus Pamon, and Langly verſus Balwin, the laſt of which was in 1707. I anſwer, in thoſe Caſes it is limited only to the 1ſt. 2d. 3d. and 4th. ſo that all the Iſſues that may be, are not comprehended in the Words of Purchaſe; and therefore the Words (if he die without Iſſue) may by Implication operate ſo as to give the Father an Eſtate Tail, for the 5th Son could not take as a Purchaſor, becauſe it's only to the 1ſt. 2d. 3d. and 4th. Son; and then the Words, if he dies without Iſſue, then the Remainder over; ſo that as long as he hath Iſſue the Remainder can't take Effect; but here the Words are general, and take in all the Iſſues.

The Caſe of Popam verſus Bainfield in Salk. 236. is ill reported; for the Book ſays it was a Deviſe to A. for Life, Remainder to his firſt, and ſo to his tenth Son; but the material Words (and to all and every other Son) are left out; but in Dyer 171. it is ſaid that an Implication ſhall never ride over an expreſs Limitation, and therefore if an Eſtate is deviſed to A. for Life, and after to his firſt Son, and the Heirs of the Body of ſuch firſt Son, and if A. die without Iſſue, then over, in that Caſe A. ſhall not have an Eſtate by Implication, becauſe there is an expreſs Limitation in Tail to his firſt Son.

Another Objection is, That this can't be a deſcriptio perſonæ as comprehending Male and Female. I anſwer it is a good Word of Purchaſe, by the plain Intention of the Teſtator. There was another Point as to the Croſs Remainders, but that is now out of the Caſe, and we are of Opinion the Siſters were only Tenants for Life; ſo the Judgment was reverſed per totam Curiam.

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Venire.

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CASES

ARGUED and DECREED

IN THE

High Court of Chancery,

In the VIII, IX, X and XI Years of

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To which are added

Some Special CASES on APPEALS.

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DE

DE

Term. Paſchæ,

8 Georgii, 1722. In Cancellaria.

Hungerford *verſus* Clay.

EDward Hungerford, the Plaintiff, having mortgaged an Houſe in St. Clement's Lane in London, to the Defendant Clay, tendered the principal Sum and the Intereſt, to the ſaid Mortgagee, which he refuſing to take, he (the Plaintiff) exhibited his Bill in this Court to have a Re-conveyance upon the Payment of the ſaid Money.

Mortgagee cannot make a Leaſe of an Houſe in Mortgage before Foreclоſure, nor preſent on an Avoidance.

The Subſtance of the Defendant's Anſwer was, that he had made a Leaſe of this Houſe for five Years, reſerving ſo much yearly Rent; and that after the Expiration of the ſaid Term, he had covenanted that the Leſſee ſhould hold it for four Years longer, if he (the Leſſee) was willing ſo to do, that the ſaid five Years were now expired, and that the Leſſee was willing to hold the Houſe four Years longer; and that if the Plaintiff would grant ſuch Leaſe, then the Defendant would reconvey, upon the Payment of the ſaid principal Sum and Intereſt.

This Cauſe was heard at the Rolls, where the Defendant had a Decree in his Favour; but upon an Appeal to this Court it was inſiſted for the Plaintiff, that as a Mortgagee cannot preſent upon the Avoidance of a Church, ſo by the Courſe of Equity he cannot make a Leaſe of an Houſe or Lands in mortgage, but where there is an abſolute Neceſſity ſo to do, which doth not appear in this Caſe; for if the Mortgagee ſhould make ſuch Leaſes, they may be avoided by the Mortgagor before the Equity of Redemption is foreclоſed.

Now, admitting the Mortgagee ſhould make a Leaſe for four Years longer, reſerving Rent, and ſuch Leaſe ſhould be adjudged good between him and the Leſſee, it would be difficult for the Mortgagor to recover any Rent, tho' the Principal and Intereſt ſhould be paid, becauſe he doth not claim under the Eſtate of the Mortgagee, and therefore cannot have any Benefit of the Leaſe made by him; for he is neither Party to the Deed, nor Privy to the Eſtate, therefore the Mortgagee ought to reconvey free from all Incumbrances.

Econtra. Thoſe who argued for the Defendant, admitted that a Mortgagee cannot preſent upon an Avoidance of a Church; the Reaſon is, becauſe it doth not leſſen his Debt; but 'tis otherwiſe where he makes a Leaſe of a Houſe or Lands in Mortgage, rendring Rent, for certainly the Payment of Rent will leſſen the Debt; ſo there is no Parity of Reaſon between thoſe Caſes.

Curia. But the Lord Chancellor was of Opinion, that the Mortgagee, before Foreclоſure of the Equity of Redemption, cannot make a Leaſe for Years of an Houſe in Mortgage to bind the Mortgagor, unleſs to avoid an apparent Loſs, and meerly in Neceſſity; ſo the Decree at the Rolls was reverſed.

Orby *verſus* Trigg.

Covenant, that if the Eſtate was to be ſold, the Mortgagee ſhould have the Benefit of Pre-emption; but not being claimed before the Eſtate was ſold, he loſt the Benefit of that Covenant.

THE Brother of the now Plaintiff mortgaged his Lands to the Defendant, and afterwards died, in which Deed of Mortgage there was a Covenant to reconvey upon ſix Months Notice of the Payment of the principal Sum and Intereſt; and another Covenant, that in Caſe the Eſtate was to be ſold, that the Mortgagee ſhould have the Pre-emption.

After the Death of the Brother, who was the Mortgagor, his Widow delivered up the Counter-part of the Mortgage to the Attorney of the Mortgagee; and now the Plaintiff having given the Defendant ſix Months Notice, that he would pay the Principal and Intereſt; and having it ready to pay, the Defendant refuſed to accept it; whereupon the Plaintiff exhibited his Bill for a Reconveyance of the Eſtate having entered into Articles, with a Purchaſer for the Sale thereof.

The Defendant by his Anſwer inſiſted on the Covenant in the Deed to have the Pre-emption; but it appearing, that neither the Plaintiff or the Purchaſer knew any Thing of this

Covenant, for that the Counterpart of the Mortgage was delivered up as aforeſaid; and that the Plaintiff had often made Application to the Mortgagee for a Copy thereof, which was as often denied, he inſiſting only to have the Principal and Intereſt paid, for that the Security was too narrow for the Money which he had lent; and that if it was not paid by ſuch a Time, he would foreclose the Equity of Redemption, but never mentioned that he was to have the Benefit of Pre-emption till after the Eſtate was ſold; therefore he ought not now to claim it to the Prejudice of the Purchaſer, and of the Plaintiff, having ſo long Time for that Purpoſe before the Eſtate was ſold; and it was decreed accordingly, and the Mortgagee to reconvey upon Payment of the Principal and Intereſt, &c.

Ailoffe *verſus* Tracy.

UPON a Bill exhibited againſt the Executors of Sir Thomas Haſelwood, the Caſe appears to be thus:

The Father agreed to give his Daughter 3000 *l.* as a Marriage-Portion with the Plaintiff, and having deviſed 2000 *l.* to her died before the Marriage. Decreed that the Husband ſhall not have the other 1000 *l.* becauſe he knew that 2000 *l.* was deviſed to her, and having accepted that Legacy in Marriage, ſhall have no more.

ſ. An Agreement was made in the Year 1720. between the Plaintiff, and the ſaid Sir Thomas, that he the ſaid Plaintiff ſhould marry the Daughter of Sir Thomas, by which Agreement the Plaintiff was to ſettle ſo much Lands in Jointure, in Conſideration of the ſaid Marriage, and of 3000 l. to be paid to him as the Marriage-Portion.

The Marriage took Effect, and that four Years before this Agreement was made, (viz.) Anno 1716. Sir Thomas Haſelwood made his Will, and thereby deviſed to his ſaid Daughter the Sum of 2000 l. and no more; and before the ſaid Marriage was had, the ſaid Sir Thomas died ſuddenly; and now the Plaintiff exhibited this Bill againſt his Executors to have the other 1000 l. paid to him according to the ſaid Marriage-Agreement.

The Court was of Opinion, that the Plaintiff might have ſome colourable Pretence to this 1000 l. if before his Marriage with the Daughter he had not known, that her Father had deviſed 2000 l. to her, and no more; but having married the Daughter, and accepted that Legacy, he ſhall recover no more. Curia.

Beſides, if this 1000 l. had been recoverable, it muſt be in Right of the Husband alone, for his Wife hath no manner of Right; therefore if he die before 'tis recovered, his Executors or Adminiſtrators, and not the Wife will be entitled to it, ſo that he ought rather to have exhibited his Bill for the whole 3000 l. than for 1000 l. Reſidue thereof, becauſe the 2000 l. he received by Virtue of the Will, can be no Part of the 3000 l. upon the Marriage-Agreement; ſo the Bill was diſmiſſed with Coſts.

DE

Term. Sanct. Trin.

8 Georgii, 1722. In Cancellaria.

Gore *verſus* Gore.

Deviſe to the eldeſt Son of his eldeſt Son in Tail Male, and for Want of ſuch Iſſue to the Uſe of his ſecond Son in Tail Male; he ſhall take immediately

THIS Caſe upon the Pleadings was agreed on both Sides to be as followeth, (viz.) The Father being ſeiſed in Fee, deviſed his Lands to Truſtees, and their Heirs, Executors, &c. for the Term of five hundred Years upon ſuch Truſts as by his Will ſhould be declared, and from, and after the Expiration, or other ſooner Determination of the ſaid Term and Eſtate, then to the Uſe of the eldeſt Son (of his the ſaid Teſtator's eldeſt Son) and the Heirs Males of his Body; and for Default of ſuch Iſſue to the Uſe of his (the ſaid Teſtator's) ſecond Son, and the Heirs Males of his Body with ſeveral Remainders over in Tail.

The Father died, and his eldeſt Son having no Iſſue, the ſecond Son claimed the Eſtate as the Iſſue in Tail Male; and upon the Hearing this Cauſe, the Caſe was thus ſtated, and referred to the Judges of the King's Bench for their Opinion, who ſhould have this Eſtate, either the ſecond Son of

the Teſtator, or whether the Fee-ſimple ſhould remain in the Truſtees until his eldeſt Son ſhould have a Son.

And upon hearing Counſel on both Sides, it was the Opinion of the Judges that the ſecond Son of the Teſtator ſhould take immediately upon his (the Teſtator's) Death, and their Reaſons were, firſt, becauſe the Son of the eldeſt Son (not yet born) could not take by Way of Remainder, becauſe there was no particular Eſtate to ſupport it; neither could he take by Way of executory Deviſe, ſo that if the Fee-ſimple ſhould deſcend on the Heir at Law of the Teſtator, and veſt in him till this Contigency of the Birth of his eldeſt Son ſhould happen, it would tend to a Perpetuity.

Now this Caſe coming back to the Court upon the Judges Certificate of their Opinions, it was moved that it might be argued again, becauſe being referred to them by way of Caſe ſtated, no Writ of Error would lie upon their Judgment.

Where a Reference is to the Judges on a Caſe ſtated, no Writ of Error will lie on their Judgment; if they certify their Reaſons, the Court may conſider of it.

The Court declared, that where a Caſe is referred to the Judges for their Opinion, it ſhall conclude this Court, 'tis true, 'tis not ſo when they come into Court, and give their Opinions here; but the Judges having certified their Reaſons for their Opinions, this Court may conſider thereof, like a general Verdict at Common Law, which concludes the Judgment of the Court; but if the Jury ſpecify their Reaſons for ſuch Verdict, 'tis otherwiſe; ſo where the King grants a Thing ex mero motu, without any expreſs Conſideration, ſuch Grant is good; but where the Conſideration is expreſſed in the Grant, and 'tis either wrong or falſe, it makes the whole Grant void, if the Conſideration is not executed, for this holds only where the Conſideration is executory. Curia. Hob. 222.

Now if the Parties ſhould reſt under this Opinion of the Judges, there would be an End of the Cauſe, and as this is a Point which ought not to be determined by the Opinion of any one Court, but to have a final Determination in a proper Method; therefore it was ordered, that Counſel ſhould ſpeak to this Point at the Hearing this Cauſe, ſo that it may come before the Houſe of Lords upon an Appeal, if either of the Parties ſhould think fit; but they agreed. *See* the Caſe of *Vernon* ver. *Boothby*.

The

The Mayor and Burgeſſes of Coventry *verſus* Lord Craven, *and others.*

After a Decree ſigned, enrolled and exemplified, the Plaintiff had Relief upon an original Bill concerning the ſame Matter.

AN Information had been formerly exhibited againſt the Mayor, &c. for miſapplying a Charity; and upon a Bill likewiſe brought againſt him in this Court, it was made appear, that the Magiſtrates of Coventry had taken 4000 l. of this Charity to their own Uſe; and thereupon it was decreed, that they ſhould repay that Money by ſuch a Time, or that the Lands thus given for this Charity ſhould be conveyed to other Perſons for the Purpoſes aforeſaid.

But the Magiſtrates not complying with this Decree in paying the Money, and not being able to advance the ſaid Sum of 4000 l. the ſaid decretal Order was ſigned, enrolled, and exemplified under the Great Seal; and by Virtue thereof the ſaid Lands were conveyed to the Lord Craven, and to twenty-nine other Perſons, and to their Heirs, in Truſt, and for the Benefit of the Poor of that Place.

And now the Plaintiffs exhibited an original Bill againſt the ſaid Truſtees to have a Reconveyance of theſe Lands, upon Payment of the ſaid 4000 l. for that the Donor having appointed the Mayor for the Time being, &c. to be Truſtees and Overſeers of theſe poor People, the Lands ought not to be taken from them, but upon ſome great Miſdemeanor of their own; and that the Reaſon for which they had been taken away being now of no Force, for that the Money was ready to be paid in full Satisfaction for the Faults of their Predeceſſors; and that ſuch Reconveyance ought to be made the rather, becauſe moſt of the Members of the Corporation in whoſe Time this Money was miſapplyed, were now dead, ſo that there could be no Room for conteſting their Right to thoſe Lands; and for that, the Mayor, &c. being a Body politick, the now Members of that Body ought not to be damnified by the Faults of their Predeceſſors.

'Tis true, the former Decree made againſt the now Plaintiffs the Mayor, &c. is ſigned and enrolled, and exemplified under the great Seal; but yet the Plaintiffs may have Relief upon an original Bill againſt ſuch a Decree; as for Inſtance; the * Wife after Separation from her Husband, had a Decree in this Court for Alimony, which Decree was affirmed upon a Bill of Review, and likewiſe upon an Appeal in the Houſe of Peers; but the Husband being willing to be reconciled to his Wife, exhibited an original Bill to ſet aſide

* Whorewood *verſus* Whorewood. 1 Ch. Rep. 250. Ch. *Caſes* 153.

the ſaid Decree; and tho' it was confirmed with ſo much Solemnity, yet the Lord Keeper Finch, being aſſiſted by the Judges, did agree, that it was a proper Bill, and the Huſband was relieved.

Therefore it was inſiſted for the Plaintiffs, that they being willing to perform every Thing in the former Decree, the Lands ought not to be taken from them, but that they ought to have a Reconveyance; beſides, an original Bill is proper where a Decree hath been already obtained; for it may appear that ſuch Decree was obtained upon ſome precedent Fraud or Surpriſe; and after a Decree to foreclose the Equity of Redemption, a longer Time hath been allowed to pay the Principal and Intereſt.

'Tis true, in this Caſe, the Conveyance is abſolute to the Defendants and their Heirs; but 'tis ſtill a Conveyance under the Decree of this Court, which is conditional, and like a conditional Surrender and an abſolute Admittance, which muſt be made conditional, according to the Surrender out of which it ariſes.

It was inſiſted for the Defendants, that this is a very improper Bill, and not within the Rules of this Court, as it appears by a printed Copy of thoſe Rules now produced; for amongſt the reſt it appears, that no Decree ſhall be varied or altered, after 'tis exemplified under the Great Seal, unleſs for Error in Law or Fact, appearing in the very Body of ſuch Decree, or by Matter ariſing ſince the Decree, or upon ſome Evidence which could not be had at the Time the Decree was made. Econtra.

'Tis true, the Plaintiffs offer now to pay the 4000l. which they have raiſed out of other Lands given to them in Truſt likewiſe for a Charity, and for which there is an Information already filed againſt them; ſo that if a Reconveyance of the Lands now in Queſtion ſhould be decreed for them, and the Plaintiff in the Information ſhould prevail, they might raiſe Money out of the Lands thus reconveyed, to ſatisfy the other Charge againſt them.

The Court made no Decree, but could conſider the Caſe of Whorewood, which is truly cited as above.

Anneſly *verſus* Palmer.

Making a ſecond Will is a Revocation of the Firſt: After the Probate of the Firſt was confirmed by the Delegates, a Commiſſion of Review was granted.

THE Caſe was thus, (viz.) The Teſtator made one Will in the Year 1708, and about four Years afterwards, (viz.) In the Year 1712, he made another Will; and

and by the first he devised all his real Estate to charitable Uses, and all his personal Estate to particular Legatees therein mentioned; and by his other and Last Will he devised his personal Estate to other Persons, and all his real Estate to such Uses as he should afterwards declare concerning the same, but died before he made any Declaration of such Uses.

Afterwards, upon a Contest between the Executors of both the said Wills, the First was proved in the Spiritual Court; and that Probate was confirmed upon an Appeal to the Delegates; and upon this Contest one of the Executors having alledged, that the Testator, Sir William Robinson, died without Heirs; it was proved, that Sarah Palmer, the Wife of the now Plaintiff was his Heir at Law.

Whereupon she and her Husband entered on the greatest Part of the real Estate, supposing that the first Will by which that Estate was devised to a Charity, was revoked by making another Will; and the Testator dying without making any other Disposition thereof, it must descend to the Plaintiff as his Heir at Law.

And now upon a Bill exhibited against her and her Husband, by those who claimed under the first Will; it was insisted for her, that the Suit in the Spiritual Court was between the contending Executors, and that she (tho' she was Heir at Law) was neither Party or Privy to that Suit, and therefore she prayed that a Decree might be made in her Behalf as to the real Estate, and likewise that the first Will might be set aside as to the personal Estate, for tho' the Probate of that Will was confirmed by the Delegates; yet 'tis now evident, that it was no Will, being revoked by a subsequent Will.

Econtra. It was admitted on the other Side, that the Making a second Will is a Revocation of the First; but that is not the present Case; for upon an Issue directed out of this Court to try, Whether the Testator revoked his Will, which he made in the Year 1708, the Jury found, that he did not revoke it any otherwise than by making another Will in the Year 1712, which last Clause was omitted by the Clerk of the Assise in drawing up the Verdict; and on the Postea it was returned generally, that he did not revoke it, which being neither the Act of the Jury nor of the Court, Application was made to the Court of King's Bench, to certify that the Verdict was drawn up as the Jury found it, which was, that the Testator did not revoke his first Will any otherwise than by making another Will; and after two Motions made in full Court for that Purpose, the Chief Justice was inclinable to certify

that it was ſo; but he was over-ruled by the other three Judges, who, tho' they were ſatisfied in their Conſciences that it was ſo, yet would not introduce ſo dangerous a Precedent.

Therefore it was inſiſted upon Affidavits produced and read of this Matter, to falſify that Part of the Record, either by a new Trial, or by any other Means the Court ſhould direct.

But admitting the ſecond Will ſhould amount to a Revocation of the Firſt, it ſhall be taken in a Court of Equity to be only a Revocation pro tanto, and that is of the perſonal Eſtate.

As to the perſonal Eſtate, here is a Will proved, and that Probate confirmed upon an Appeal to the Delegates, which ſhall conclude all Perſons both in Law and Equity, to make any Demands thereof contrary to the ſaid Will. Curia.

But now here is a ſubſequent Will found by Verdict, and that to the Satisfaction of this Court; but the Probate of the Firſt being ſtill in Force againſt thoſe who claim under the Second, (if they deſire it) the Court will grant a Commiſſion of Review in order to ſet it aſide; but if upon ſuch a Commiſſion of Review the Probate of that Will ſhould be confirmed by the Delegates, there will be an End of the Cauſe, for there cannot be a Review upon a Review.

Quære. For there may be a Commiſſion of Re-examination to examine the Sentence of the Delegates. Cro. Eliz. 571.

There was no Decree made in the principal Caſe.

Raſhfeild *verſus* Careleſſe.

THE Teſtatrix by her Laſt Will and Teſtament deviſed a Legacy of 5 l. to the Defendant (whom ſhe made Executor) for the Care and Pains he might ſuſtain in fulfilling the Truſts in her Will; and there being a reſiduary Part of the perſonal Eſtate after the Debts and Legacies were all ſatisfied and paid; the Plaintiff, who was of Kin to the Teſtatrix, exhibited a Bill in this Court againſt the Executor, to have a diſtributive Share thereof, inſiſting, that a ſpecifick Legacy being deviſed to the Executor for his Care in ſeeing the Will performed, he ſhall be deemed as a Truſtee for thoſe amongſt whom the reſiduary Eſtate ought to be diſtributed. Where collateral Proof ſhall be admitted to ſhew the Intention of the Teſtator. The Executor having a ſpecifick Legacy deviſed to him, is a Truſtee for the reſiduary Part.

On the other Side it was inſiſted for the Executor, that he ought to have the Reſiduum notwithſtanding this ſpecifick Legacy of 5 l. deviſed to him, becauſe there was Evidence that Econtra.

the Teſtatrix intended he ſhould have it; and ſome Inſtances were offered where Evidence had been given of ſuch Intentions.

'Tis true, in the Caſe of Littlebury and Stukely it was decreed, that the Executor ſhould not have any Share of the Reſidue for the Reaſon mentioned on the other Side, (viz.) Becauſe he had a ſpecifick Legacy deviſed to him, as in the principal Caſe, but that Decree was reverſed in the Houſe of Lords, it appearing that it was the Intention of the Teſtator, that he (the Executor) ſhould have all, and the rather, becauſe the ſpecifick Legacy was deviſed to the ſaid Executor at large, the Will not mentioning (as in the preſent Caſe) for what End it was given; nor did any Thing appear on the Face of that Will, to ſhew that the Teſtator intended no more for him than that Legacy.

And now ſome Caſes were cited, where collateral Proof had been admitted to ſhew the Intention of the Teſtators, as in the Counteſs of Gainsborough's Caſe, and the Dutcheſs of Beaufort's Caſe, in both which Caſes collateral Proof was given of the Intention of their Husbands, and they both obtained the perſonal Eſtates in the Houſe of Lords.

So likewiſe in the Caſe of Harris and the Biſhop of Lincoln, where the Teſtator deviſed his Eſtate to the right Heirs of his Mother; and Proof was admitted to ſhew, that he intended it for the right Heirs of his Grandmother, the Eſtate coming from her Family; and this was held not to be contrary to the Will; and in laſt Eaſter-Term it was accordingly decreed by the preſent Lord Chancellor.

The Reply. To which it was anſwered, that the preſent Caſe is not like any of thoſe before cited; and firſt, as to the Counteſs of Gainsborough's Caſe, the Suit was between the Heir at Law and the Executors to make the perſonal Eſtate in her Hands to be Aſſets in order to ſatisfy Debts, and ſo far to diſcharge the real Eſtate, and Proof was admitted to ſhew, that the Earl intended his Lady ſhould have all his perſonal Eſtate in Nature of a Legacy, tho' he had given her a ſpecifick Legacy in the ſame Will.

And as to the Dutcheſs of Beaufort's Caſe, where the Uſe of the Plate was deviſed to her for Life; this was adjudged to be no Legacy, ſo as to bar her from having all the perſonal Eſtate as Executrix, becauſe ſhe had not an abſolute, but only a ſpecial Property in the Plate.

But a Proof dehors a Will was never yet admitted; 'tis true, if a Will wants an Explanation, Evidence may be given

to explain it, but never where it explains it self (as in the present Case); for what can be plainer than a specifick Legacy given to one for his Care and Pains in performing a Will; this is a Legacy which implies a Negative so as to exclude the Legatee from any farther Demand out of the personal Estate, (viz.) That he shall have so much for his Pains, and no more; and so it was held by the present Lord Chancellor in the Case of Mayhoe and Lewen.

But it would be of dangerous Consequence to admit any Evidence dehors a Will, and repugnant to the Will it self, because 'tis in Effect laying aside the Will of the Testator, and making a new will upon such Evidence, which was condemned by the Legislature, when the Statute of Frauds and Perjuries was made; for to what Purpose should any Man make a Will, if 'tis in the Power of any Court to set it aside upon Proof of any Matter dehors the Will, and make a Decree accordingly.

When the Will explains it self, no Evidence dehors should be admitted; now in this Case, as to the residuary Part of the Estate, the Executor is excluded from having any Benefit thereof, by the Devise of a specifick Legacy to him; therefore there ought to be a Distribution amongst the Kindred. Curia.

This is agreeable to the Case of * Forster *versus* Munt, where the Testator devised particular Legacies to his Children and Grandchildren, and ten Pounds a-piece to his Executors for their Care, &c. and there being a great residuary Part of his personal Estate undisposed, it was decreed, that it should go to his said Executors, but that it should be in Trust for the Children. 1 Vernon 473.

Heron *versus* Newton. *At the Rolls*

THE Case was, that the Testator by his last Will and Testament made two Executors, and gave them specifick Legacies, and by his said Will desired them to be Kind to one Sarah Tufton his old Servant, and to give her some small Pieces of Furniture then in his House, if she desired it: The Question in this Case was (as in that last mentioned) who should have the Residue of the personal Estate after Debts and Legacies paid; and it was decreed, that the Executors should have it free from Distribution, it being the apparent Intent of the Testator it should be so; for otherwise they could not be kind to his old Servant, or give her any Part of his Fur- Where the Executor shall have the residuary Part free from any Distribution.

Furniture, if it was not theirs to give, and if he left them no Assets for that Purpose; so that those Words are explanatory of what the Testator intended: The Bill was dismissed.

DE

Term. Sanct. Mich.

9 Georgii, 1722. In Cancellaria.

The Countess Dowager of Coventry *versus The Earl of* Coventry.

Where a defective Execution of a Power was helped in Equity.

THomas Earl of Coventry being seised in Fee of several Manors, Lands and Tenements, &c. demised the same to Trustees, and their Heirs to the Use of himself for Life; Remainder to his eldest Son Gilbert for Life, with a Power to settle a Jointure on any Wife he should marry, not exceeding 500 *l. per ann.* so as she brought an equivalent Fortune; Remainder to the Heirs Males of the Body of the said Gilbert, Remainder to the present Earl (the now Defendant) and the Heirs Males of his Body, with several Remainders over.

Earl Thomas died, and thereupon Earl Gilbert being seised for Life as aforesaid, married the Plaintiff; and in Consideration of the said Marriage, and of 10000 l. Portion which he had with her, entered into Articles, by which he covenanted, &c. for himself, and his Heirs, to settle Lands according to this Power, or otherwise of the Value of 500 l. per ann. on her for Jointure; and having asked, and being informed by his Steward, which of his Lands were the most proper to be settled, a Draught of a Settlement of Lands to that Value was drawn and engrossed for him to sign, which lay 4 Years,

and was never executed by Earl Gilbert, who afterwards being ſuddenly taken ill, he deviſed 3000 l. to the Plaintiff, and all his Plate, Jewels, &c. and 250 l. per ann. to be paid to her for Life out of other Lands, and died without Iſſue Male; ſo that the ſaid Manors, Lands and Tenements came to the preſent Earl (the now Defendant) againſt whom the Plaintiff, the Counteſs Dowager, exhibited a Bill in this Court to have a ſpecifick Execution of the ſaid Power, and that ſhe may retain the Lands mentioned in the ſaid Settlement, though not executed by Earl Gilbert in his Life-time.

And it was inſiſted for her, that this Power given to Earl Gilbert (though he had only an Eſtate for Life) ought to be favourably conſtrued in a Court of Equity; for where-ever ſuch a Power is given to a Tenant for Life, who would have been ſeiſed in Fee, if it had not been for that Deed by which the Power it ſelf was created, it ſhall receive a more favourable Conſtruction, than if it had been reſerved to one who is a Stranger to the Inheritance by the Rules of Deſcent. For the Plaintiff.

That it plainly appeared by the Proofs in this Caſe, that Earl Gilbert certainly intended to execute this Power; for by his Direction a Deed was drawn for that Purpoſe, which the Truſtees for the Counteſs diſliking at the Time the ſaid Earl was about to execute it, he ſent up to London to have another Deed drawn, which was done, and returned into the Country, and was in the Poſſeſſion of his Steward, who being gone from home, the Earl died ſuddenly without executing that Deed; ſo that if it appears to this Court, that Earl Gilbert deſigned to execute it, that ſhall be taken in Equity to be good againſt the preſent Earl, like a Will, which though not ſigned by the Teſtator is good in Equity to charge the Heir at Law in the Realty, as well as the Executor in the Perſonalty.

On the other Side it was argued, that not to execute a Power punctually was the ſame Thing as not to execute it at all, and Powers not executed, are never helped in this Court, unleſs 'tis to avoid an apparent Injury in Conſcience, though in Strictneſs of Law loſt, which is not the preſent Caſe, becauſe it appears, that this Lady (the Plaintiff) hath a very good Proviſion made for her by the Will of Earl Gilbert her late Husband; for he left her a Legacy of 3000 l. together with the Value of 200 l. more of his perſonal Eſtate, which with the 250 l. ſettled on her for Life, and payable yearly out of certain Lands is a reaſonable Equivalent for her Fortune. Econtra.

As

As to the Case of a Will, that it shall be good in Equity, tho' not signed by the Testator, it hath its own Reasons; for if he writes his Name in any Part of his Will, 'tis a good Signing, and Wills are commonly made in extremis, and for that Reason they are favoured in Equity.

Now in the present Case, it appears that Earl Gilbert made a Will a little before his Death, and he might at the same Time have executed the Deed, if he had intended so to do; but probably he thought that he had done enough already for the Plaintiff; and therefore would not lay any farther Charge on the Lands.

'Tis true the Plaintiff brought a considerable Portion in Money, and so came in as a Purchaser for a valuable Consideration; but that will be no Reason to charge the present Earl, because none of it came to his Use; but if it charges any one, it must be either the Heirs or Executors of Earl Gilbert; for he covenanted that he or his Heirs would settle 500l. per ann. on the Plaintiff, which could not be by Virtue of the Power reserved in the Will of Earl Thomas, because Earl Gilbert had only an Estate for Life, and consequently could not bind his Heirs to settle a Jointure by Virtue of that Power; so that if his Heirs are bound, it must be in another Respect, but the Defendant can never be bound as Heir, because he is the Remainder Man in Tail.

'Tis true Powers reserved in a voluntary Settlement, as this was by Earl Thomas, ought to be favourably construed in Respect to him who made them; but 'tis not so where Powers are joined to an Estate to charge that of a Stranger; but yet there are Cases where Powers reserved in and by a voluntary Settlement have not received a favourable Construction in this Court; as for Instance; in the Case of the Earls of Mountague and Bath, where a Power of Revocation was reserved in a Deed, but it was to be in the Presence of three Privy Counsellors; and the Duke of Albemarle who had reserved such Power, did by his Will revoke the Deed, but being at that Time Governor of Jamaica, he could not do it in the Presence of three Privy Counsellors; tis 'true this Revocation was held good in Equity, but it was upon that particular Reason, (viz.) because he could not have three Privy Counsellors there.

But this Court denied to help the single Circumstance of a Mistake in the Tender of a Guinea.

* Pasch. 4 Annæ. So in Sir * Charles Orby's Case which was thus, (viz.) The Earl of Macclesfield was Tenant for Life with a Power to make Leases for Twenty-one Years, or three Lives, so as

the old accuſtomed yearly Rent was reſerved; he made a Leaſe for three Lives, without any ſpecial Reſervation, but only yielding and paying the old accuſtomed Rent generally; and this was held a void Leaſe.

This Court will not decree the Execution of a Power to the Prejudice of a third Perſon, when the Time for executing that Power is lapſed; now a Power given to Tenant for Life to make Leaſes, or to ſettle a Jointure, ſhould be ſtrictly conſtrued, becauſe it enlarges the Eſtate for Life beyond its natural Duration, to the Prejudice of thoſe in Reverſion or Remainder.

So where a Woman made a Settlement of her Lands, with a Power to revoke it at any Time, in Favour of her Husband, and ſhe afterwards ſent ſeveral Letters to her Lawyer to prepare a Deed to revoke that Settlement, and to give the Eſtate to her Heir, but never executed ſuch Deed; this Court refuſed to make a Decree, according to what appeared to be her Intention by thoſe Letters; for the Decree ought to be founded on what ſhe had done, and not on what ſhe intended to do.

In the principal Caſe, no Decree was now made, the Lord Chancellor taking Time to conſult the Judges. *See* Hele v. Hele. 2 Ch. Rep. 28, 29.

Afterwards this Caſe was argued again in Eaſter-Term, Anno 10 Georgii, before the Lord Chancellor, aſſiſted by the Maſter of the Rolls and Baron Price and Baron Guilbert, and the Subſtance of the Arguments for the Plaintiff were as follow:

For the Plaintiff.

1. This Bill was brought to have a Jointure intended to be ſettled on the Plaintiff by Virtue of a Power in the Will of Thomas Earl of Coventry, which provides, that it ſhall be lawful for any Perſon who ſhall be ſeiſed, &c. by Virtue of the ſaid Will, to ſettle 500 l. per Annum on any Wife he ſhould marry, ſhe bringing an equivalent Fortune.

The Teſtator died, and Earl Gilbert being ſeiſed of the Eſtate for his Life, entered into Articles to Truſtees, &c. upon his Intermarriage with the Plaintiff, by which he covenanted to ſettle Lands purſuant to his Power, or otherwiſe, of the Value of 500 l. per Annum on her, and got a Draught of a Settlement to carry the ſaid Articles into Execution, in which this Power was mentioned; and directed that a Mortgage which affected ſome of the Lands ſhould be diſcharged, in order to make the Settlement more effectual.

And this Bill being brought in the Diſjunctive, (viz.) Either to be quieted in the Poſſeſſion of the Lands mentioned in the Settlement thus drawn, or to have Satisfaction from the

the Heir of Earl Gilbert; this Court directed an Account to be taken what Assets of Earl Gilbert came to his Heirs, which, on the Report made thereof, fell short some thousand Pounds to satisfy the Plaintiff's Demands.

And thereupon it was now argued, that these Articles ought to be carried unto Execution, and the rather, because the Plaintiff is a Purchaser for a valuable Consideration, and the Defendant is only a Volunteer under the Will of Earl Thomas, the Case being strictly as followeth:

The Case. ſſ. Tenant for Life, without Impeachment of Waste, with a Power to settle 500 l. per Annum on any Wife he should marry, and who should bring an equivalent Fortune, Remainder to the Defendant, &c. Tenant for Life, upon his Marriage, entered into Articles, by which he covenanted to settle 500 l. per Annum on his intended Wife; and in Pursuance of this Covenant, a Settlement of Lands was drawn by his Direction, but he died before he executed the said Deed; now 'tis a general Rule in Equity, that where there is a Purchaser for a valuable Consideration, on Articles only, without any other Conveyance, those Articles shall be carried into Execution; and as this is often done in the Case of an Heir, on the Articles of his Ancestor, so it ought to be done in the present Case.

And those Cases where the Court would not compel the Execution of Powers, are where it would be against the Will of the Donor, they should be executed; such was the Case of the Heir in Tail, where this Court would not enforce him to suffer a Common Recovery, though his Father was decreed so to do, and died in Contempt for not doing it.

'Tis true, where a Power is not executed at all, but totally neglected, there may be some Reason for a Court of Equity not to enforce the Execution thereof; but where 'tis executed in any Part, tho' not strictly performed, 'tis the standing Rule of this Court to make it good.

Now, upon Consideration of the Circumstances of this Case, and the Solemnity of the Transactions, by Drawing a Settlement pursuant to the Articles, and by the express Direction of Earl Gilbert; this is a good Execution of his Power in Equity.

Besides, the strict Execution of this Power was prevented by an Accident, for Earl Gilbert called for this Settlement in his last Sickness, which was ready ingrossed, and in the Possession of his Steward, who being then gone from home, it could not be had for him to execute before he died, so that the Plaintiff hath good Equity even upon that Foot; and there

are several Precedents where Articles have been carried into Execution against Remainder-Men, as the Case of the Lord Burlington *versus* Clifford, and Hollingshead *versus* Hollingshead, and Parker *versus* Parker, for younger Childrens Portions, and Alford *versus* Alford, in which last Case the Person who had the Power covenanted to execute it before he had it, and whilst it was in Contingency; but it afterwards vesting in the Covenantor, and not being executed by him, it was carried into Execution against the Remainder-Man, and so should this.

Those who argued for the Defendant, admitted that the Plaintiff was a Purchaser in the highest Sense, and for the most valuable Consideration, which is Marriage, and a Portion in Marriage; yet where she is such a Purchaser at large, and of no particular Lands, she must take her Remedy where the Law gives it, and that cannot be of those Lands, for certainly she is no Purchaser thereof at Law. Econtra.

There are three Things relied on by her Counsel to make her a Purchaser in this Court, and those are the Articles, the Drawing the Settlement pursuant to the said Articles, and the Will of Earl Thomas; and that tho' one of these might not do it, yet juncta juvant; and it hath been said, that every Wife who brings an equivalent Fortune is a Purchaser of those Lands under that Will, and the Power thereby created; but this is a very wrong Position, because 'tis essential that every Power should be ad libitum of him who hath it, till 'tis executed; so that the Plaintiff cannot be said to be a Purchaser under this Will and Power, before that Power is executed.

And as to the Articles so much relied on, and the Covenant therein mentioned, to settle 500 l. per Annum, 'tis only a general Covenant relating to no particular Estate or Lands, therefore the Plaintiff is only a Creditor under that Covenant at large, which is not like the Case of Hollingshed and Hollingshed, for there the Covenant was tied to the very Lands in the Power, and there were no other to answer it.

'Tis true, that special Forms of Words are not necessary in executing Powers, and that Infants and Femes Covert may perform the same, because they are only Instruments; 'tis true likewise, that in the Lord Burlington's Case there was a general Covenant, but it did not rest there, for he settled what he pretended was 1000 l. per Annum, according to the Articles, which was afterwards found to be of less Value, and appeared so to be by the Defendant's Answer.

But the Case of the Mortgagee, who had a Decree in this Court against the Mortgagor (who was Tenant in Tail) to suffer a Common Recovery, and he died in Contempt of the Court in not performing the said Decree; yet the Court would not carry that Decree into Execution against the Heir in Tail, is a very strong Case against the Plaintiff, the Lady Coventry, for in that Case the Tenant in Tail had an implied Power to suffer a Common Recovery, by Virtue of that Estate which he had in the Lands, and he himself might have been compelled to do it, if he had been living, but after his Death his Heir was not; and yet he in a greater Measure derived his Estate under his Ancestor, who was Tenant in Tail, than the present Defendant doth under Earl Gilbert.

'Tis true, a Tenant in Tail hath Power only by Implication in Law to suffer a Common Recovery; but there seems to be no material Difference between implied and express Powers; for wherever the Parties are on a Level as Volunteers, this Court will never interpose to favour one more than the other.

'Tis admitted, that in this Case some Steps were taken towards a future Act, but still all rested in Intention; and it seems reasonable to have this Power or this Covenant carried into Execution, if there was no other Way by which it might be satisfied; but 'tis plain there were other Means by which it may be satisfied, and that is by the personal Assets of Earl Gilbert, therefore a specifick Execution of this Power ought not to be decreed.

The Opinion of the Judges, Assistants.

The Judges who assisted the Lord Chancellor divided this Case into two Points:

(1.) Whether any Thing was done by Earl Gilbert in Consequence of this Power, to make it a Lien on the Defendant who was a Remainder-Man.

(2.) If any such Thing was done, then whether the Defendant hath any Equity to be re-imbursed out of the Assets of Earl Gilbert.

As to the first Question, they held, that Earl Gilbert had so far executed the Power as to be a Lien on the Estate in the Hands of the Remainder-Man.

When Powers were first created by the Statute 27 H. 8. they were strictly construed at Law, and the Reason was to avoid Recalling and Unsettling Estates already settled; and probably for the same Reason such Powers had no Countenance in this Court.

But the Power in the preſent Caſe, which is reſerved to a Tenant for Life to raiſe an Eſtate, is Part of the old Dominion which the Donor had over his Eſtate, and agreeable to his Intention at the very Time he made ſuch Reſervation; and therefore ſhould have a favourable Conſtruction in this Court.

That the Price here given, (i. e.) The Portion paid, and the Articles executed, are a compleat Conveyance, and a good Execution of this Power; and that ever ſince the Execution of theſe Articles, Earl Gilbert was a Truſtee for the Plaintiff, and ſuch Truſt is aſſignable and deviſable in this Court.

That there is but one Caſe cited at the Bar againſt this Opinion, and that is the Caſe of the Mortgagor who was Tenant in Tail, and was decreed to ſuffer a common Recovery, but died in Contempt of that Decree, and this Court would not carry it in Execution againſt the Heir; but the Reaſon may be, becauſe the Heir, after the Death of his Anceſtor, was in by the Statute de Donis, which this Court could not control; but if the Anceſtor had been Ceſtui que Truſt in Tail, his Heir would have been bound by ſuch Anceſtor's Lien, becauſe in that Caſe, he would not have been in by that Statute. 2 Vent. 350.

It hath been argued at the Bar, that theſe Articles ſhall not be carried into a ſpecifick Execution in Favour of a Volunteer, when there is a plain Remedy to be had on the Covenant for Damages; but that is only where a Man is ad libitum to perform it or not.

If the Truſtees by the Marriage Articles had exhibited a Bill in this Court to have a ſpecifick Execution thereof, it would certainly have been decreed for him, and ſo ought it to be for the Plaintiff, eſpecially ſince the Power created by the Will of Earl Thomas covers all the Eſtate which he ſettled by that Will.

Upon the whole, it might be hard for a Court of Equity to carry the Settlement alone, thus drawn and engroſſed, into the Execution of this Power excluſive of the Articles, becauſe the Statute of Frauds now ſtands in the Way; but this Power being bound by the Articles, the very Draught of that Settlement is a good Deſignation of what Lands ſhould be ſettled, and a Determination of Earl Gilbert's Election to raiſe the 500l. per ann. out of, and by Virtue of his Power.

As to the ſecond Point which is, Whether the Defendant hath any Equity to be reimburſed out of the Aſſets of Earl 2d Point.

Gilbert, (i. e.) how far those Articles will bind his Heirs; and as to that Matter, the Words are to be considered, (viz.) That he or his Heirs would settle Lands of the Value of 500 l. per ann. by Virtue of his Power, or otherwise; now it hath been said at the Bar, that these are technical Words writ currente calamo, and inserted in the Articles without Consideration; but this seems to be a Mistake, for the Words were carefully put in as auxiliary to the real Lien, (viz.) That if his Power should happen to be insufficient to settle 500 l. per ann. that then it should be done by some other Means; and 'tis probable this Marriage had never taken Effect, but in Consideration of this Power, so that the Assets of Earl Gilbert shall not come in Exoneration of the settled Estate; for where-ever Assets are brought in Exoneration, there the Debt originally charged the Personalty.

'Tis true he had Election to raise this 500 l. per ann. out of his own Assets, or out of his Power; but it seems plain, that he intended to raise it out of his Power; for here was a Deed drawn and engrossed, tho' not executed, by which Deed the Lands therein mentioned, being of the Value of 500 l. were settled on the Plaintiff in Jointure, so that this initiate Act, tho' not consummate, is sufficient to shew his Intention to execute this Power which he was bound by the Articles to perform; but if it had been ad libitum, there an initiate Act would not have been sufficient.

Curia. It was decreed for the Plaintiff, that she was a Purchaser of this 500 l. per ann. under the Will of Earl Thomas, and the Articles of Earl Gilbert, and that, tho' this Power was not strictly performed, yet here being a valuable Consideration, it shall be carried into Execution in this Court; that the Articles are a sufficient Lien in Equity to carry it into Execution; and this being a Lien ever since the Articles were executed, there can be no Colour to charge the Assets of Earl Gilbert; so it was decreed that the Plaintiff should have those very Lands specified in the Deed.

DE

Term. Paſchæ,

9 Georgii. In Cancellaria.

The Earl of Strafford *verſus The Lady* Wentworth.

THE Caſe, ſi. Sir John Smith being Tenant for Life, made a Leaſe for Years, rendring Rent payable on ſuch a Day, and afterwards died about two of the Clock in the Afternoon of that Day on which the Rent was payable; and the Tenants having paid the Rent to the Lady Wentworth, who was the next in Remainder, the Plaintiff took out Adminiſtration to the Inteſtate Sir John Smith, and then exhibited his Bill in this Court to oblige the Defendant, who had wrongfully received the Rents, to pay it over to him, alledging that the Rent was due to the ſaid Inteſtate in his Life-Time.

The Leſſor died on the very Day the Rent was payable, 'tis not due till the laſt Minute of that Day.

But it was inſiſted for the Defendant, that the Rent was not rightfully due to the Inteſtate until twelve of the Clock of that Night; though 'tis demandable before Sun-ſet, for the Benefit of the Tenants to ſave a Condition, &c. for 'tis not legally due to the Landlord till the laſt Minute of that Day on which 'tis payable; and the Tenants having paid it to the Defendant who had a Right to the Remainder, in whoſe Time it incurred, and became due, the Plaintiff cannot recover it from her, unleſs he ſhews that it veſted in the Inteſtate; and to prove this Point, the Caſe of the Lord * Rockingham was cited, (viz) The Leſſor died on Michaelmas-Day in the Afternoon, and before the Setting of the Sun; it was inſiſted for the Execu-

* Lord Rockingham *verſus* Oxenden. 2 Salk. 578.

Executor, that the Rent being reſerved payable on that Day, it might have been paid in the Morning, and that a Releaſe upon ſuch Payment had been a good Diſcharge; but it was decreed in that Caſe, that the Rent ſhould go to the Heir, becauſe at the Time of the Death of the Leſſor, he had no Remedy to compel the Payment, and by Conſequence it was not veſted in him till the laſt Minute of that Day.

Curia. The ſingle Queſtion is, if this Rent was due to the Inteſtate or not, for if it was, then the Plaintiff who is his Adminiſtrator ought to have it.

'Tis true it was not due from the Tenants till the laſt Minute of the Day on which 'tis payable, neither could they be compelled to pay it till after that Day; but they having paid the Rent, they admitted it was due from them, and 'tis plain the Defendant had no Right to receive it; therefore it being paid into a wrong Hand who received it without any Title, it ought to be paid over to the Plaintiff who had a colourable Title to receive it as Adminiſtrator to the Inteſtate.

DE

Term. Sanct. Trin.

9 Georgii. In Cancellaria.

The Dutcheſs of Marlborough *verſus* Sir John Vanbrook, *and others.*

THE Caſe, ſi. After the Battel of Blenheim the Parliament was ſo well ſatisfied with the Conduct of the Duke of Marlborough in obtaining a Victory there, that a Vote paſſed the Lower Houſe, that ſomething might be done by the Publick for the ſaid Duke, to perpetuate the Memory of that Service; and at length it was reſolved, that Blenheim-houſe ſhould be built for him at the Expence of the Publick, and purſuant to that Reſolution the Queen by her Officers agreed with Workmen to build that Houſe.

Where after an Account ſtated, the Parties were decreed to account again before a Maſter.

But after laying out 200,000 l. in Building it, the Duke fell into ſome Diſgrace, and was charged to give an Account what Money he had received of the Crown, and how he diſburſed it, and the Building was no longer carried on at the Publick Expence, but at the Expence of the Duke: And at that Time there was 45000 l. due to the Overſeers of this Building, and their Workmen; and * they who ſettled the Accounts with them had but 16000 l. of the Publick Money in their Hands, to ſatisfy that Debt, which they had paid, ſo that there was 29000 l. due to them, as the Account then ſtood, for which they exhibited a Bill in the Exchequer againſt the ſaid Duke, and had a Decree in their Favour; and now upon an Appeal in the Houſe of Peers, it was inſiſted, that the Decree ought to be repealed, for that the Duke

* Mr. Craggs, Mr. Sloper, Mr. Lowns.

Duke was not obliged to pay this Debt, being a Stranger to the Vote of the House of Commons for Building this House, and being then out of the Kingdom, and never intended to lay out above 40,000 l. in Building an House for himself, which he had already laid out in carrying on and finishing the Building thus begun by the Publick; besides, it did not appear that there was any Manner of Contract made by him, or by any other Person by his Order or Authority with the Workmen, &c. to carry on this Work, therefore they ought to take their Remedy where by Law they could.

It was farther said, that now the House was built, it was of no real Benefit to the Appellant, because it was so very large, that the Furnishing and Keeping it in Repair would rather be an Incumbrance than a Profit to any Subject; so that there could be no Colour to inforce the Appellant to pay this Debt.

Econtra. It was insisted for the Respondents, that they were Workmen and Tradesmen, and that they built this House in Expectation of being paid for their Goods and Labour, and having no Means to compel the Payment any otherwise, than by applying to the Duke, tho' all their Contracts were made with publick Ministers, it would be a very great Hardship if they should be unpaid, and such an Hardship as the Circumstances of some of them and their Families could not bear; and therefore it would be more reasonable, that the Appellant (who enjoyed this House, and had the Inheritance thereof) should pay for it, tho' there was no special Contract to charge him, than that the Respondents should be without any Manner of Remedy for their Money; and it being made appear that the Appellant very often approved the Building, and gave particular Instructions to some of the Respondents concerning the same, they had the said Decree affirmed in the House of Peers, and that the Duke should pay this Debt.

Afterwards the Attorney General moved the Court, that the Duke might be at Liberty to file this present Bill against the Defendants, for that the Account settled by Mr. Craggs, Mr. Sloper, and Mr. Lowns, who were employed by the Publick, ought not to conclude him, the rather, that since they had no Power from him (the Duke) there was no Reason their Account should bind him; and for that since he had carried on the Work on his own Account, it was done at a much cheaper Rate in every Article than when the Publick was to pay for it; and now, since the House of Peers had decreed he should pay the Workmen, it was reasonable he should have

a fair Account from them, and Vouchers ſhould be produced to the ſame, eſpecially ſince it doth not appear, that the Houſe of Lords, who affirmed the Decree, ever intended that he ſhould be concluded by the ſtated Account; and tho' this Motion was ſtrongly oppoſed, yet it ſeemed reaſonable to the Court to grant it; and thereupon the now Plaintiff filed the ſaid Bill, the Scope of which was, that the Plaintiff might have an Account of what Money the Defendants had received for their Work in Building Blenheim-houſe, and to know what is fairly and juſtly due to them reſpectively, in order that the ſame may be paid.

One of the Defendants, who was an Overſeer of this Building, by his Anſwer ſays, that he is not to account with any but the Crown; and having already accounted, he inſiſts, that he ought not again to be called to account for the ſame Thing; and all the Defendants ſay, that they took the Duke to be their Pay-maſter, &c.

At the Hearing the Cauſe it appeared, that in the Warrant to the Overſeers of this Building to proceed in the Work, it was expreſly mentioned, that they ſhould be accountable to none but to the Duke of Marlborough; therefore it was inſiſted for the Plaintiff, who is Executrix of the Duke, that ſhe ſhould have their Account; 'tis true, there is a great Demand made by Sir John Vanbrook, but there is no Reaſon that the Plaintiff ſhould be ſadled with it, becauſe he was an Officer for the Crown, from whom he had a Penſion to overſee this Work; but if the Court ſhould be of another Opinion, then it muſt be conſidered how much he muſt be paid, for he inſiſts on 600 l. per Annum for himſelf, and 300 l. per Annum for his Aſſiſtant, which is very extravagant, becauſe Sir Chriſtopher Wrenn, who was generally eſteemed the moſt experienced Architect in England, had but 200 l. per Annum, for Overſeeing the Building of St. Paul's Church; and though theſe Officers and Workmen ſay for one another, that the Bills delivered and allowed in the ſtated Account are reaſonable, yet there is a convincing Proof of the Falſity of that Aſſertion, (viz.) That ſince the Duke carried on this Work at his own Charge, it was done at twenty per Cent. cheaper in every Article, than it was carried on before.

Beſides, it will appear in Proof, that the Crown paid for ſeveral Things which were never done, and that there were ſeveral Frauds committed by the Overſeers and Workmen; as for Inſtance; there were 600 Half-Bricks delivered

in, and reckoned at 800 whole Bricks, and that when these Officers wanted Fruit, they ordered the Grocer to send it, and then charged it as Candles burnt in carrying on the Building; therefore, though there is an Account settled with the Crown, 'tis unreasonable it should conclude the Duke, who is a Stranger to it, and is now become chargeable in his own Right.

Econtra. They who opposed the Plaintiff said, that as to the Officers, and particularly as to Sir John Vanbrook, that by Virtue of the Decree made in the House of Lords, the Workmen who were employed by him ought to be paid by the Duke from the Nature of the Warrant; and certainly the same Reason will oblige him to pay Sir John, who employed them, unless some Cause can be shewed why the Warrant should be effectual to the Workmen, and not to the Officers by whom they were employed.

'Tis true, Sir John was an Officer of the Crown, and as such he received a constant Salary, but that will not oblige him to serve every private Man on that Account, but rather to have a greater Reward when he is employed by a Subject; because, to be employed by the Crown is such an Approbation of his Merit, that he must be esteemed in a superior Degree than others of the same Profession.

'Tis true likewise, that Sir Christopher Wrenn was a very great Architect, and had no more than 200 l. per Annum, for Overseeing the Building of the Cathedral of St. Paul's, but he lived in London, and had several other Works carrying on there at the same Time, whereas Sir John was exposed to the Fatigues of long Journeys to Woodstock, and at the Expence to have constant Lodgings there.

And as to the Workmen, most of the Arguments of their Counsel turned upon the Hardship it would be for them to come to a new Account before a Master in Chancery, for so great a Sum as it hath Cost for the Building this House, and to produce Vouchers for every Particular after such a Length of Time.

Besides, several of the present Defendants were the Widows Children, and other Representatives of the deceased Workmen; so that it would be almost impossible for them to produce Vouchers for the Work done by those whom they represent, after so long an Acquiescence under the stated Account, upon which they might so much rely as to make them remiss

and negligent of ſuch Vouchers, that probably great Part of them might be loſt.

But the Court, after Enumerating ſome of the great Actions of the late Duke of Marlborough, who carried every Thing he undertook by the Strength of his great Conduct and Courage, decreed that the Officers and Workmen ſhould come to an Account before a Maſter, and that the ſtated Account ſhould not ſtand in the Way. Curia.

Hutchiſon & al' *verſus* Vincent.

THE Plaintiff had a Brother who (as it was ſuggeſted in the Bill) died ſeiſed of a real Eſtate, and poſſeſſed of a perſonal Eſtate of great Value; and by his laſt Will and Teſtament, after deviſed ſeveral Legacies to particular Legatees, and made the Defendant Vincent Executor, and died, againſt whom the Plaintiff and his Siſter exhibited this Bill to have the real Eſtate, and their diſtributive Shares of the perſonal Eſtate, or of the reſiduary Part thereof after Debts and Legacies paid.

Where an Executor hath no ſpecifick Legacy deviſed to him, he ſhall have the *Reſiduum* of the perſonal Eſtate after Debts and Legacies paid.

The Defendant by his Anſwer ſets forth, that the Teſtator by his laſt Will, deviſed a Legacy of Fifty Pounds to his Brother the now Plaintiff; but left nothing to the other Plaintiff his Siſter, and that he made the Defendant Executor, but left no ſpecifick Legacy to him, ſo he inſiſts, that he as Executor is entitled to the Reſidue of the perſonal Eſtate of which the Teſtator died poſſeſſed, and denies that he was ſeiſed of any real Eſtate, or if he was, the Defendant diſclaims all manner of Right to it.

Thoſe who argued for the Plaintiff inſiſted, that tho' the Defendant is made ſole Executor by this Will, which after a long Conteſt is now eſtabliſhed; yet as this Caſe is circumſtanced, the Defendant ought not to have the whole perſonal Eſtate, but ſhall be preſumed as a Truſtee for the next of Kin of the Teſtator, unleſs it can be ſhewed, that it was his Intent his Executor ſhould have the Whole. For the Plaintiff.

Now by this Will it ſtands indifferent, Whether the Teſtator intended the Benefit ſhould be either for the Defendant who was his Executor, or for his next of Kin; but 'tis in Proof, that he very often expreſſed a great Regard for his Brother and his Children; therefore it cannot be preſumed he intended his Eſtate for a Stranger.

It was argued for the Defendant, that nothing appears upon the Face of this Will, to induce the Court to intend Econtra.

the Defendant to be a Truſtee for the next of Kin; therefore the Preſumption muſt be, that he intended the Eſtate for the Defendant; and tho' there are few Caſes in Point, yet the Reaſon which governs ſome other Caſes of the like Nature, may likewiſe govern this, but there is no Caſe to prove that an Executor is a Truſtee barely by being appointed Executor.

And it may be ſome Reaſon to induce the Court to decree in Favour of the Defendant, when it ſhall be conſidered what vaſt Expence he hath already ſuſtained in the Conteſt of this Will; for firſt the Plaintiff conteſted it in Doctors-Commons, and after Sentence there for the Will, he appealed to the Delegates, where that Sentence was affirmed; then he indicted ſeveral of the Witneſſes for Perjury, who proved the Will, and they were all acquitted, there being no colourable Proof againſt them, ſo that having been defeated at Law, and in the Spiritual Court, he now makes his laſt Attempt in Chancery.

Curia. An Executor hath certainly the whole and entire Right to the Teſtator's perſonal Eſtate both in Law and in Equity, unleſs upon the Face of the Will it appears by ſome Indications, that the Teſtator intended to the contrary, as by giving him a ſpecifick Legacy; for by ſuch a Deviſe it appears, that he intended him no more.

And this was laid down as a Rule, when the Lord Jefferies was Chancellor, and with good Reaſon, and hath been a ſtanding Rule in the Court ever ſince (with ſome little Variations and Exceptions from the Circumſtances of Caſes) to exclude the Executors.

1 Vernon 473. But the Executor in the preſent Caſe having no ſpecifick Legacy deviſed to him, it doth not appear but that the Teſtator intended the whole perſonal Eſtate to him; therefore this Bill was diſmiſſed, but without Coſts, upon Condition the Plaintiff ſhall not trouble the Defendant with any farther Demands.

Spencer *verſus* Chaſe.

Deviſe of Lands to Truſtees and their Heirs, until his Son come to the Age of 25 Years; he mortgaged the Lands at 21 Years of Age, 'tis void.

THIS was a Bill exhibited by the Plaintiff againſt the Defendant, to have an Account of what was really due to him, and to have a Reconveyance of the Eſtate upon Payment of the Money, &c.

The Bill ſets forth, that the Defendant had impoſed on the Plaintiff when under Age, and had got ſeveral Bargains made between them, which he compelled the Plaintiff to exe-

cute ſince he came of Age, and particularly a Mortgage of an Houſe in Ruſſel-Street in Bloomsbury, which the Defendant now claims as an abſolute Sale; and that he perſuaded the Plaintiff to Mortgage other Lands to him (the Defendant) to ſecure the Repayment of 640 l. when in Truth, he (the Plaintiff) never received above 320 l. of him upon any Account whatſoever.

The Defendant by his Anſwer denies any Truſt of the Houſe in Ruſſel-Street, but inſiſts, that it was an abſolute Sale thereof to him, and as to the Mortgage-Money he could not remember the ſeveral Sums he had paid to the Plaintiff, but affirmed that he had paid ſeveral Sums to him, and diſcharged ſeveral of his Notes to other Perſons; but cannot tell when, or to whom ſuch Notes were payable, or who were Witneſſes to them, having cancelled them at the Time he took this Mortgage for his Security; but that he had actually paid to the Plaintiff 101 l. 10 s. and 60 l. more, and delivered a Chaiſe to him, in all, to the Value of 200 l. and upwards, but denies any Impoſition on the Plaintiff, and inſiſts, that he may be allowed 210 l. the Plaintiff had of him over and above the 640 l. ſecured by the Mortgage, beſides his Charges and Bills of Fees and Expences, as an Attorney for the Plaintiff, which were not yet made up, but inſiſts that they ſhould be allowed on the Account.

It was argued for the Plaintiff, that from the Nature of this Tranſaction he had a very hard Caſe; for it appeared in the Cauſe, that he was an Attorney's Clerk, and being very extravagant was encouraged, ſupported and ſupplyed by the Defendant in that way of living, he being another Attorney in the Neighbourhood, and who knew the Plaintiff was entitled to the ſaid Houſe and Lands whilſt under Age; and having been ſupported in his Extravagancies with ſeveral ſmall Sums of Money at ſeveral Times by the Defendant, he threatned this young Man as ſoon as he came of Age, to ſend him to Gaol if he did not repay the Money; and thereupon he extorted from him both this Conveyance of the Houſe in Ruſſel-Street, and the Mortgage of his other Land. For the Plaintiff.

Now this Houſe is very well tenanted, being a good Houſe, and let for 40 l. per annum, and the Plaintiff who was entitled to the Reverſion after the Death of an old Life then in Being, ſold it to the Defendant for 100 l. who within a few Days afterwards ſold it to one Huckſley for Two hundred Pounds.

And

And as to the Mortgage-Money, even the Defendant cannot shew any Particulars of Money paid by him, more than the Plaintiff hath set forth in his Bill; so that he must come to an Account for that Money, and ought likewise to account for the Profits of the House in Russel-Street, notwithstanding the pretended Conveyance thereof was made by him after he came of Age, because it was extorted from him in the Manner as already mentioned.

Econtra. But as to that Matter, it was answered by the Defendant's Counsel, that there was no Colour to make him account for the Profits of the House in Russel-Street; for tho' Huckfley gave him 200 l. for it in a little Time after he (the Defendant) bought it of the Plaintiff; yet that was a great deal more than the real Value, it being bought for the Convenience of the Purchaser, whose House was contiguous, and that there was no Colour to avoid the Sale thereof, because there was no manner of Proof, that the Plaintiff was imposed on or circumvented.

And as to the Mortgage-Money, there being a Cross Bill exhibited against the Plaintiff, he owns in his Answer, that he had received several considerable Sums of the Defendant; therefore if he (the Defendant) shall be made subject to account, and it being very hard to prove every particular Disbursement made by him in Behalf, and for the Use of the Plaintiff, it may be reasonable that he should be examined upon Interrogatories, and that the Defendant's Bill of Costs, and all other his Demands may be brought into the Account, and allowed.

But upon reading the Will of the Plaintiff's Father, which was his Title to the mortgaged Lands, it appeared to be a Devise of the said Lands to Trustees and their Heirs, until the Plaintiff came to the Age of 25 Years, and then in Trust for him and the Heirs of his Body, Remainder to the right Heirs of the Father.

And it appearing, that the Plaintiff was not of the Age of 25 Years when he executed this Mortgage, but of the Age of 21 Years, and no more, so that expressly by his Father's Will, he was not to take till four Years after the Mortgage

Curia. was made; the Court was of Opinion, that it was void in Law; for if it was a contingent and executory Devise to the Plaintiff, 'tis plain he had no Title till the Contingency should happen; but if the Estate-Tail was executed in him, then he might make a Title by suffering a common Recovery, but let it be either Way, he was now of Age, and ought to pay or secure what is justly due to the Defendant.

But as to the Sale of the House in Russel-street, it was an Imposition on the Plaintiff, for the Defendant bought it for less than three Years Purchase; therefore he ought to make an Allowance for what he sold it more than he paid for it to the Plaintiff.

And the Mortgage was decreed to stand as a Security for what should appear to be justly due to the Defendant, of which the Master was to take an Account, and that the Plaintiff should have his Costs to this Time, to be deducted out of what shall appear to be due to the Defendant; and that upon Payment thereof the Defendant shall reconvey.

But upon Non-payment the Plaintiff shall suffer a Common Recovery for the Defendant's Security, and be foreclosed according to his Prayer in the Cross Bill; and if the Defendant is willing to be at the Charge, the Plaintiff shall suffer a Recovery immediately, lest the Defendant should die before what is due to him shall be paid.

Bertie *versus* Lord Chesterfield, *at the Rolls.*

THE Case, ſt. The Plaintiff Mr. Bertie, was desired (as suggested in the Bill, but not proved) by the late Earl of Caernarvan, to see his Lady buried; and thereupon the Plaintiff employed an Undertaker of Funerals to bury the said Lady, expecting to be repaid what he should lay out in the funeral Expences, by the Defendant, the Earl of Chesterfield, to whom the Earl of Caernarvan had devised 6000 l. per Annum, subject to the Payment of his Debts; but he refusing to pay the said Charges, the Undertaker brought an Action at Law against the now Plaintiff, and recovered 270 l. for this Burial.

The Husband's Estate in the Hands of another is subject to the funeral Charges of his Wife.

Thereupon the Plaintiff exhibited a Bill in this Court against the Defendant, to discover Assets in his Hands of the Earl of Caernarvan's Estate, and to subject the same to the Payment of this Money for the Burial of his Lady.

It appeared in this Cause, that there was a Settlement of separate Maintenance made for this Lady, and that she had Power to dispose it by Will, and that accordingly she made a Will, and thereby devised several Legacies to Persons therein mentioned, and constituted the now Plaintiff Executor thereof; but it was insisted for him, that Settlements for separate Maintenance shall never extend to funeral Charges; and tho' the Lady had made a Will, and the

Plaintiff

Plaintiff Executor, yet it appeared she had given away more than she had to dispose.

For the Defendant. It was said for the Defendant, that since the Plaintiff was made Executor, and had of his own Accord taken upon himself the Burial of the Testatrix, there could be no Reason to charge the Defendant, for there could be no equitable Charge on my Lord Caernarvan's Estate in the Defendant's Hand, unless the Plaintiff was desired to oversee and take Care of this Burial of his Lady; and altho' that did not appear to be the Case, yet because the Plaintiff took nothing of her Estate, by being made Executor, for she gave away the Whole in Legacies,

Curia. It was decreed, that the Husband's Estate is subject by Law to pay the funeral Expences in Burying the Wife, therefore the Plaintiff shall be re-imbursed out of the Lord Caernarvan's Estate in the Defendant's Hands, together with his Costs at Law, and in this Court; but his Bill was dismissed with Costs, as far as it related to the Undertaker, who was made a Party to this Suit.

Lawly *versus* Lawly.

Lands were settled in Marriage on Trustees, &c. that if the Wife survived, then she should receive the Profits as they were then let; the Husband made Leases and advanced the Rent: Decreed, that the Heir at Law shall have the advanced Rent.

THE Case, ff. Sir Francis Lawly had Issue Sir Thomas, who had Issue Sir Thomas, the now Plaintiff; and the said Sir Francis, upon the Marriage of his Son Thomas, settled several Lands on Trustees, &c. in Trust for the said Sir Francis, during his Life, Remainder to his Son Sir Thomas for Life, Remainder to the First and every other Son and Sons of Sir Thomas in Tail Male, with a Power to either of them when in Possession, to make Leases of any Part of the said Lands for twenty-one Years, or three Lives; Provided, that if the Lady Lawly should survive Sir Francis and Sir Thomas her Husband, then in Trust to permit her to receive the Rents and Profits of these Lands during her Life, as the same were at that Time let.

Sir Francis died, and Sir Thomas entered and let those Lands at an advanced Rent, and died, and his Lady received the said Rent during her Life, for several Years, and made her Will, and the Defendant Executor thereof, and died.

And now the Plaintiff exhibited this Bill as Heir at Law to Sir Thomas and Sir Francis his Grandfather, to have an Account of the Executor of the Lady Lawly of the Overplus of the Rent received by her in her Life-time, and what hath been received by the said Executor since her Death, and that it

may be paid to him, for that he is entitled to it as Heir at Law, as aforesaid.

The Defendant answers and says, that if the Lady Lawly received more than she ought, it was above fourteen Years since; so pleads the Statute of Limitations; and if that should not be allowed, then he says that he hath not Assets, but what is sufficient to answer Debts of an higher Nature affecting the same.

But the Defendant was decreed to Account, and that what shall appear to have been received by the Lady more than she ought to receive (being the improved Rent) shall be paid to the Plaintiff out of her Assets; and what hath been received by the Executor since her Death shall be paid out of his Assets. Curia.

And as to the Statute of Limitations the Plea was disallowed, because the Estate in Law was in Trustees; and the Defendant was ordered to pay Costs. Statute of Limitations, no good Plea where the Estate in Law is in Trustees.

Carrick & al' *versus* Errington.

THIS was a Bill exhibited by the Plaintiffs Carrick and two others, as Heirs at Law to Edward Errington; and it was to avoid and set aside a Conveyance obtained by the Defendant by Fraud, suggesting, that the said Edward was a weak Man in his Intellects, and that he conveyed the Lands, &c. to Trustees and their Heirs, in Trust for Thomas Errington, for Life, Remainder in Trust to his First, and every other Son in Tail Male, Remainder to William Errington in like Manner; and all this in Consideration only of 200 l. for which Reason it appeared to be a Fraud and Imposition on the said Edward. Where Papists are not disabled by the Statute to bring their Bill in Equity.

The Defendant pleaded, that Two of the Plaintiffs are Papists, and consequently disabled to bring this Bill by the Statute 11 & 12 Will. 3. for that they cannot take by Descent from their Ancestor; and as to the other Plaintiff there is nothing in the Case but what may be tried at Law, (viz.) What was the Consideration of this Conveyance; and 'tis plain, that the Defendant Errington was eighteen Years of Age and upwards, when the aforesaid Statute was made, consequently not within the Penalties; therefore it ought to be tried at Law, whether the Plaintiffs are capable to recover, or the Defendant capable to take by this Conveyance; for 'tis probable that it may appear Edward had some other Consideration

ration to make this Conveyance; besides, the 200 l. therein mentioned.

But admitting the first Limitation to Thomas is void, he being incapable to take, because he was a Papist, yet the Limitation over to William is good, and shall vest immediately.

But that was denied by the Court, for the contrary was settled in the Dutchess of Hamilton's Case, (viz.) That tho' the first Limitation is to a Papist, who is disabled by the Statute to take; yet 'tis not such a void Limitation, so as the Remainder shall immediately vest, as if the First was dead without Issue.

Besides, this Estate is more likely to continue in a protestant Family, by supporting this Conveyance, than by Destroying it, for Thomas Errington, the Papist, is an old Man and hath no Issue, but William, who is the next in Remainder, is a Protestant.

For the Plaintiff. The Counsel for the Plaintiff argued, that it was proper for him to apply to this Court, because it was to discover a Fraud, and for that the legal Estate was, and is in Trustees; so he must come into a Court of Equity to set the Deed aside.

And if 'tis set aside, the Plaintiffs must take as Heirs at Law to Edward; for tho' Two of them are Papists, yet they were above the Age of eighteen Years at the Time this Statute was made, and consequently not subject to the Penalties therein mentioned.

But admitting they were all Papists, and incapable to take, yet certainly they are capable of Coming into a Court of Equity to set aside any Conveyance fraudulently obtained from their Ancestor, and the rather, because it may happen that the next of Kin, who is a Protestant, may not be willing to be at the Expence of a Suit in Chancery for such a precarious Interest, as to receive the Profits of an Estate until the Heir at Law becomes a Protestant; so that a fraudulent Deed shall carry the Estate.

Besides, it was settled in Roper and Ratcliff's Case, that the Heir at Law, tho' a Papist, is capable to take the Inheritance, for 'tis in him, tho' the next Protestant of Kin hath the Pernancy of the Profits till the other becomes a Protestant; and the Trust limited to support contingent Remainders cannot be said to be a Trust for a Papist, nor shall the Remainder-Man in this Case take immediately, supposing the Limitation to Thomas to be void as to himself, because

he was a Papiſt, for if he ſhould take immediately, then this Abſurdity would follow, (viz.) All the contingent Remainders to the Sons of Thomas would be void; and it could never be the Intent of the Donor, that William the Remainder Man who gave no Conſideration, ſhould immediately have the Eſtate, for all the Conſideration moved from Thomas, and the only Conſideration mentioned in the Deed is Money, ſo no other ſhall be avetred.

There was no Decree made, but a Reference to a Maſter to inquire what was the Conſideration of this Deed, if any; and as for what was offered, that two of the Plaintiffs were eighteen Years old at the Time of making the Statute, and conſequently out of the Penalty, the Court was of Opinion, that they were out of the Letter of the Act, but within the Intent and Meaning of it; for the Lawmakers could never intend to put Infants of tender Years in a worſe Condition than thoſe who were of Age; but be that as it will, the Plaintiffs are proper to make Application here as Heirs at Law to Edward Errington. Curia.

Savage *verſus* Foſter.

THE Caſe, ſt. Margaret Smith being ſeiſed of the Lands in Queſtion upon her Marriage with Peter Flavill, ſettled the ſame upon Truſtees and their Heirs, to the Uſe of the ſaid Peter for Life, then upon Margaret his intended Wife for Life, Remainder after the Death of the ſaid Peter and Margaret to the Heirs of the ſaid Peter, on the Body of the ſaid Margaret to be begotten, Remainder to the right Heirs of the ſaid Margaret for ever.

Where a Perſon knowing his own Title, and not giving Notice of it to a Purchaſer, ſhall never ſet it up againſt the Purchaſe.

The ſaid Peter and Margaret had Iſſue only one Daughter (the now Defendant) who was married to one Foſter.

Peter Flavill died, and then his Widow married one Brown, by whom ſhe had Iſſue one other Daughter, and no more, which Daughter being courted by one Williams, but he refuſing to marry her without ſuch a Fortune, which Margaret her Mother was not able to give without breaking thro' this Settlement, conveyed the ſaid Lands to the aforeſaid Williams, &c. and the Defendant Mrs. Foſter and her Huſband who knew that the Lands were ſettled on her in Tail as aforeſaid, ſollicited her Mother Margaret Brown to make a Conveyance in Favour of the ſaid Williams, and were aſſiſting in carrying on the Marriage between him and her Half-Siſter Brown.

Whereupon the said Margaret conveyed these Lands, &c. to the Use of her self for Life, Remainder to Williams and his Heirs; then the Marriage took Effect; and afterwards Williams sold these Lands to the Plaintiff Savage, who entered and built an House thereon.

And now Mrs. Foster who was the Issue in Tail, by Virtue of the said Settlement, and endeavouring to set it up against the Title of the Plaintiff, who was the Purchaser, he exhibited a Bill against her to have his Title established against that Settlement; for that she having full Notice of the Purchase, and of her own Title, she gave no Notice thereof to the Plaintiff, and therefore ought not to be at Liberty now to impeach it, though she was a Feme Covert, but that she should be concluded by this Fact as well as if she was an Infant.

For the Defendant. It was argued for the Defendant Mrs. Foster, that two Things are necessary to bind the Right in Cases of this Nature; the one is, that the Party must know his own Title to the Lands; and the other is, that he must be instrumental in promoting the Purchase thereof by the Vendee, without giving him Notice of such Title; for it would be of dangerous Consequence if the bare Permission of him to proceed in the Purchase should be a Foundation to bind his Right in this Court on the Foot of Fraud.

'Tis true, the Defendant knew she had a Title under this Settlement, but she apprehended she was not to take till after her Mother's Death; she knew likewise that her Sister was about to marry with Williams, but did not know upon what Terms; but if she had known the Terms of that Marriage, she was then a Feme Covert, and her Husband ought to have given the Plaintiff Notice of her Title; therefore his Negligence shall not prejudice her who had done nothing to lose her Inheritance, and the entire Benefit of this Settlement for ever.

Contra, for the Plaintiff. On the other Side it was first denied, that the two Things before-mentioned by the Plaintiff's Counsel are necessary to have Relief in Cases of this Nature; the one, that the Party should know his own Title, and the other, that he should be instrumental in carrying on the Purchase by another, without giving him Notice of such Title.

'Tis true, he ought to know his own Title, and that must necessarily be intended in this Case, because the Defendant had the Custody of this Deed of Settlement; but 'tis not necessary that the Person interested should be active or instrumental in carrying on the Agreement in order to a Purchase;

for if the Party knew his own Title, there can be no Danger that his Right should be bound by the Purchase, because it was in his Power to help himself by giving the Purchaser Notice of such Right; and though this Defendant was a Feme Covert, yet it was a Fraud in her not to give the Purchaser Notice of her Right; and therefore it shall be bound for ever, and the rather, because the Defendant solli-cited her Mother to make this Conveyance in Favour of Williams, upon the Marriage of her Sister, and for that the Plaintiff hath entered and built on the Lands,

Where there is a parol Agreement made for a Lease, and the Lessee by Virtue of such Agreement enters and builds, this Court will establish it on the Foot of Fraud in the Lessor, notwithstanding the Statute of Frauds, &c. because Contracts executed in Part are not always within the Sta-tute, though executory Contracts are. Curia.

Now this Bill is brought to be relieved against a Fraud in the Defendant, who would avoid the Plaintiff's Title by an elder Settlement, though she was privy to, and assisting in carrying on the Marriage of him under whom the Plaintiff claims, and never gave any Notice of her Title to the Pur-chaser.

Now when any Thing in order to a Purchase is publickly transacted, and a third Person knowing thereof, and of his own Right to the Lands intended to be purchased, and doth not give the Purchaser Notice of such Right, he shall never afterwards be admitted to set up such Right to avoid the Purchase; for it was an apparent Fraud in him not to give Notice of his Title to the intended Purchaser, and in such Case Infancy or Coverture shall be no Excuse; for tho' the Law prescribes formal Conveyances and Assurances for the Sales and Contracts of Infants, and Feme Coverts, which every Person who Contracts with them is presumed to know; and if they do not take such Conveyances as are necessary, they are to be blamed for their own Carelesness, when they act with their Eyes open; yet when their Right is secret, and not known to the Purchaser, but to themselves, or to such others who will not give the Purchaser Notice of such Right, so that there is no Laches in him, this Court will relieve against that Right, if the Person interested will not give the Purchaser Notice of it, knowing he is about to make the Purchase; neither is it necessary, that such Infant or Feme-Covert should be active in promoting the Purchase, if it appears, that they were so privy to it, that it could not be done without their Knowledge.

There-

Therefore it was decreed, that the Defendant should levy a Fine to the Plaintiff, to extinguish her Right to the Lands in this Settlement, and that the Plaintiff should have a perpetual Injunction to quiet his Possession; and that if the Defendant shall levy the Fine quietly, and without Delay, then the Plaintiff shall have no Costs, otherwise he shall pay Costs.

And the Case of Watts *versus* Halewell was now remembered, where Tenant for Life borrowed Money, and his Son who was the next in Remainder, and an Infant, was a Witness to the Deed of Mortgage; this Court gave Relief on the Foot of Fraud, because the Infant did not give the Mortgagee Notice of his Title.

So in the Case of one Clere, who was an Infant, and Clerk to an Attorney, and had a Mortgage on his Master's Estate, and engrossed a subsequent Mortgage thereof to another, without giving Notice that the Estate was mortgaged before to him; and for that Reason his Mortgage was postponed on the Foot of Fraud.

Nota; In the next Sessions of Parliament, the Defendant petitioned to appeal, or to have a Rehearing at the Peril of Costs, and offered to levy a Fine on that Condition, but it was rejected for not coming in Time.

Dowse *versus* Rue.

The subsequent Mortgagee prays to redeem the first Mortgage upon Payment of what was due, and pending that Suit, the first Mortgagee sets up another Mortgage prior to them all: Decreed a Trial at Law, whether that Mortgage was executed; and if it was, how much Money was paid on it.

UPON an Appeal from a Decree at the Rolls, the Case was thus, ſt. The Defendant Mrs. Rue, whilst a Feme Sole lent 100l. to the Mortgagor, who for securing the Repayment thereof, made a Mortgage of the Lands to her, dated in April 1700.

Afterwards the Defendant married Mr. Rue, who being a seafaring Man, and having a Pension or Half-pay from the Government, proceeded in a Voyage to serve the Czar of Muscovy, and left a Letter of Attorney with his Wife to receive his Pay as it should become due.

Afterwards the Mortgagor of these Lands borrowed 600l. more of one Mary Sherlock, and for securing the Repayment thereof with Interest, he mortgaged the said Lands to her by Deed, dated in Aug. 1701. which was a Year after the Mortgage for 100l. to the Defendant Rue, who assigned the said Mortgage of 100l. to another in her Husband's Absence, pretending she had a Power so to do, and produced a Letter of Attorney (as she pretended) under his Hand for that Pur-

pose; but as soon as he returned, he brought a Bill in Equity against the Assignee, and had a Decree for a Reconveyance on Payment of 150 l. which was paid by the said Assignee to the Wife, upon her Assignment of the said Mortgage.

Then the Plaintiff Dowse, in Right of his Mother-in-Law, Mary Sherlock, who had the subsequent Mortgage for 600 l. exhibited this Bill against the Defendant Rue, and the Assignee, to have a fair Account, and to have an Assignment of the prior Mortgage of 100 l. upon Payment of what shall appear to be due thereon; and the rather, because the said first Mortgagee had all the Deeds and Title of those Lands which were left in her Possession by the Mortgagor, so that the Plaintiff, who was the subsequent Mortgagee, might be easily deceived.

But now pending this Bill, the Defendants set up another Mortgage of those Lands to them for securing the Payment of 200 l. with Interest, which Mortgage was dated 28 March, 1700, about three Weeks before the Mortgage in April, for 100 l. but it being denied by the Plaintiff, there was a Decree made at the Rolls, that it should be tried at Law, whether the Deed dated 28 March, 1700, was executed, from which Decree the Plaintiff now appeals, for that it was too short; for if upon the Trial it should appear, that such Deed was executed, yet the Money therein mentioned might be paid in Part or in the Whole; therefore it should be directed to be tried in like Manner, whether that Money, or how much thereof was paid.

For the Plaintiff.

But it was insisted for the Plaintiff, that this Mortgage of 200 l. should be set aside without a Trial at Law, because it appeared that the Mortgagor had a Title to those Lands by Lease for thirty-four Years; and in the Mortgage dated in March, he recites it to be for thirty-eight Years, so that 'tis very unlikely he would mortgage it for four Years longer than he had in it; and in April following he mortgaged it to the same Person for thirty Years, to commence immediately; and this was very extraordinary in the Mortgagee to take a second Mortgage of the same Lands for a shorter Date and Time than the First, when the Money lent and secured by this second Deed might have been better secured by Indorsing it on the Mortgage dated in March before.

Besides, if a subsequent Term of the same Premisses was taken in April, and to commence at the same Time, that will be a Surrender in Point of Law of this Deed in March before.

It

It was admitted at the Rolls, at the Hearing this Cauſe, that if the Deed in April had been to ſecure a greater Sum of Money than the Deed in March, it might have been preſumed to have been made in Satisfaction of the firſt Sum; but it may be as well preſumed, that the Mortgagor paid 100 l. of the 200 l. and gave the ſecond Mortgage in April, for the ſecuring the Payment of the other 100 l. and neglected to cancel that in March.

Beſides, the Defendant was never in Poſſeſſion by Virtue of this Mortgage dated in March, neither was the Principal or any Intereſt demanded in twenty Years.

But it was inſiſted for the Defendant, that no Alteration ought to be made in the Decree at the Rolls, but only, that it may be directed to try if any Part, and how much of this
Curia. 200 l. was paid; and thereupon it was decreed, that it ſhould be tried at Law, whether this Deed was executed; and if it was, then whether the Whole, or any Part, or how much of the Money was paid.

Reynolds *verſus The Lady* Tenham.

Guardianſhip of an Infant is not aſſignable to another.

THIS was a Petition preferred to the Lord Chancellor by Mr. Reynolds, the Grandfather of an Infant of the Age of ſeven Years, to have him taken out of the Cuſtody of his Mother (the Defendant) being a Papiſt, and to be delivered to Serjeant Banes, and another named by the Petitioner, that he might be educated in the Proteſtant Religion.

It appeared by ſeveral Affidavits ready to be produced, that this Infant was entitled to 1700 l. per Annum, as Tenant in Tail in Remainder, after the Determination of the Eſtate for Life of his ſaid Grandfather; and it was inſiſted for the Petitioner, that it might be of very ill Conſequence, that the Education of this Child ſhould be left with a Papiſt, who might inſtil the Principles of that Religion in an Infant.

That the Father of this Infant ſaid on his Death-Bed, that he expected his Father (the Petitioner) would take Care to educate this Child in the Proteſtant Religion, and not leave the Education of it to his Wife, who was a Papiſt; but he being now dead, and the Grandfather (the Petitioner) very old, and for that Reaſon unable to take the Guardianſhip on him; he deſired that Two of his Friends in whom he repoſed an entire Confidence, and to whom he aſſigned the Guardianſhip, might have the Education of this Infant.

Thereupon the Court inquired, Whether those Persons were willing to take this Charge upon themselves; and one of them, (viz.) Serjeant Banes, being present, said, that he had received several Favours from Mr. Reynolds, the Petitioner, and therefore was willing to serve him in any Thing with which he should be entrusted; and that if the Court thought it proper he would take this Charge upon himself.

But the Defendant, the Lady Tenham, did by her Counsel oppose the Making any Order upon this Petition, for that it appeared by the Oath of the Earl of Litchfield, then in Court (who was the Godfather of this Infant) and by the Oaths of several other Persons, that this Lady had so great a Regard to what her Husband in his Life-time desired, as to the Education of this Child, that she directed he should be baptised by a Minister of the Church of England, and that he is constantly attended by such a Minister ever since he hath been capable of any Instruction, and particularly he hath been taught the Church Catechism. Econtra.

Besides, the Petitioner deserves very little Favour as to this Matter, because he having 1700l. per Annum, as aforesaid, was so hard to his own Son (the Father of this Infant) that he allowed him no more than 40l. per Annum for his Maintenance, and would never see him since his Marriage with the Defendant, and had never seen this Infant, his Grandchild, or desired to see it; therefore it would be very hard to take a Child from a Mother, at the Instance of a Grandfather, who was so very unkind to his own Son, and to commit it to the Care of Strangers (for he doth not desire the Guardianship himself) and the rather, because the Mother is willing to give any Security the Court shall approve, that this Child shall be educated in the Protestant Religion, and that the Earl of Litchfield would be one of her Securities, or otherwise, that this Child might be delivered to that noble Lord, or at least, that he may be one of the Guardians, and that she may have the Liberty of seeing her own Child, and not be deprived of that Comfort which all other Mothers naturally enjoy.

This Lady hath been married to two Protestants, and still continues a Roman Catholick, and probably to her Honour so to do, being convinced she is in the Right; but tho' her Honour hath got so far the better of her Principles, as to educate this Child a Protestant, according to the Desire of her Husband, yet 'tis to be feared, that she will always have such Persons about her as may instil the Principles of an- Curia.

other Religion in his Mind, and make a wrong Impreſſion on his tender Years.

Beſides, if this was not to be fear'd, it might be more advantageous for the Child to be under the Care of ſome other Perſons, and not of his Mother, who by her Indulgence and Fondneſs might do it an Injury.

Therefore it was ordered, that the Child ſhould be delivered to thoſe Perſons whom the Grandfather (the Petitioner) had appointed to be Guardians, but ſo as the Mother may ſee him at any Time.

But this Decree was reverſed in the Houſe of Lords, upon the Appeal of the Lady Tenham, and there reſolved, that theſe Words of her Husband on his Death-bed, (viz.) That he expected his Father (the Petitioner) would take Care to ſee this Child educated in the Proteſtant Religion, were a good Appointment to make the Grandfather Guardian.

That the Appointment of a Guardian is a bare Power and Truſt, and not aſſignable, as it hath been reſolved in * Bedle and Conſtable's Caſe; and about three Years ſince in the Duke of Beaufort's Caſe, whoſe Father had appointed the Duke of Ormond Guardian; but he being attainted of High Treaſon, and ſo made uncapable, another Guardian was appointed by Act of Parliament, it being not to be done by any other Power.

* Vaugh. Rep.

Therefore the Petitioner the Grandfather was ordered to take the Guardianſhip upon himſelf in Perſon; for that he could not aſſign his Power to another, and this is agreeable to another Decree made in the Houſe of Lords, in the Caſe of † Foſter *verſus* Denyon.

† 2 Chan. Rep. 237.

Steed *verſus* Cragh, *at the Rolls.*

A long Term of Years was veſted in the Husband in Right of his Wife, he made an Underleaſe for ten Years; and upon borrowing Money of the Leſſee, covenanted to grant him another Leaſe after the End of the ten Years, and to continue during the Time he had any Right, but died before he made ſuch Leaſe: Decreed that this was a good Diſpoſition of the Term in Equity.

THE Defendant being a Feme Sole, and poſſeſſed of a long Term for Years, afterwards married with W. R. who made an Underleaſe to *L. R.* for ten Years; and in ſome ſhort Time after, having Occaſion for Money, he borrowed it of the ſaid L. R. the Underleſſee, and covenanted that he would grant him another Leaſe of the Premiſſes, to commence after the Expiration of the ſaid Term for ten Years, and to continue during the Time he had any Right, *&c.* but died before he made ſuch Leaſe.

L. R. the Underlessee assigned his Term of ten Years to B. B. and also all his Right which he had by Virtue of this Covenant, and then B. B. by his last Will devised the same to the Plaintiff Steed, who entered, and was possessed, and the Term for ten Years being expired, the now Defendant (who was Plaintiff at Law) brought an Ejectment; and thereupon the Plaintiff exhibited a Bill to be continued in the Possession of the Lands by Virtue of the said Covenant, and that the Court might declare he had a Right under it, and grant an Injunction to stay Proceedings at Law.

The Defendant demurred to the Bill, suggesting, that if there was any such Covenant, it was only a bare Agreement between the Parties, and rested in Covenant, which could only charge the Executors or Administrators of the Covenantor; and that she claims neither as Executor or Administrator, but by Virtue of that Right which she had paramount that of her Husband; and therefore insisted that this Bill might be dismissed with Costs.

But the Counsel for the Plaintiff argued, that this Covenant was a good Disposition of this Term in Equity, and that it was not prayed in the Bill, that the Defendant should be obliged to carry this Covenant into Execution, but that the Court would declare it to be a good Disposition of the Term in Equity; and thereupon to grant an Injunction against the Defendant. Econtra.

And accordingly it was decreed at the Rolls, that this Covenant was a good Disposition of the said Term in Equity, because the Husband had a Power to dispose it; and that the * Covenant was such a Lien as bound the Right, in whose Hands soever it went. *See Poph. 4. 1 Vernon 396.

Anonimus.

THE Case was, ſſ. A Feme Sole being possessed of a Term for Years, married W. R. who was afterwards divorced a mensa & thoro, and she had Alimony allowed to support her; and now the Husband intending to sell this Term, her Counsel moved for an Injunction. The Husband possessed of a Term in Right of his Wife, was divorced, *a mensa & thoro*, and an Injunction was granted, he being about to sell this Term.

Which the Court denied at first to grant, because the Separation a mensa & thoro did not destroy the Marriage, for the Parties were still Husband and Wife; now supposing the Husband had been entitled to this Term in his own Right before Marriage, and afterwards had been divorced from his Wife, and she had Alimony allowed, this Court would

never have granted an Injunction to hinder him from selling; and certainly whilst the Marriage continues, he hath the same Power to dispose the Term, which he hath in Right of his Wife, as he had if it had been in his own Right.

But her Counsel still pressing for an Injunction, so that the Merits of the Cause might come before the Court, and insisting very much on the Hardship of the Case, and that the Wife could have no Remedy if this Term was sold,

The Court granted an Injunction; for though the Marriage continues notwithstanding the Divorce, yet the Husband doth nothing as Husband, nor the Wife as Wife.

The Executors of Devallar *versus* Herring; *before the Barons of the Exchequer at* Serjeants-Inn-Hall *in* Chancery-Lane, *in* Trinity-Vacation.

Trover for an Annuity Ticket, the Plaintiff was Nonsuit.

THE Case, ſſ. One Smith who was a Proprietor of an Annuity Ticket in one of the publick Funds, sold it to White, who sold it to Devallar a single Man, who made the Plaintiffs his Executors, and died.

The Plaintiffs coming to his House after his Death, found one of his Scrutores opened, which they suspected to be done by one Powell his Man-Servant, by the Contrivance of the Servant-Maid, they being the only Persons in the House, and are since intermarried.

Upon examining the Books of Account, the Plaintiffs found an Entry made of an Annuity Ticket bought of White on such a Day, which was a little before his Death; and that Ticket being now lost, the Plaintiffs advertised it in the publick Papers with a Promise of a Reward to any Person who should produce it, and to stop it before it passed the Office.

But this Advertisement being not made till about two Months after the Testator's Death, the Ticket was sold before that Time in Exchange-Alley, and passed thro' several Hands till it came to the Defendant Herring, who purchased it for a valuable Consideration, and had it transferred at the Office to himself as from Smith the first Proprietor, whose Name was endorsed; and a blank Space left over it to fill up the Endorsement as usual, all which was done before the Advertisement.

The Plaintiffs, (the Executors) knowing this Ticket to be in the Poſſeſſion of the Defendant Herring, brought an Action of Trover againſt him; and at the Trial they were nonſuited, becauſe the Defendant having a Transfer from Smith, the firſt Proprietor, and counter-ſigned in the Office, he had thereby a Property, and no other Perſon could have a legal Right to it; for the * Statute by which theſe Annuity Tickets were created, or the Fund for the ſame, expreſly provides that every Transfer of theſe Tickets ſhall be filled up, and counter-ſigned at the Office, and an Entry kept of every Aſſignment, or Transfer with the Names of the Parties contracting for the ſame.

* 11 & 12 Annæ.

And it being a Queſtion at this Trial, Whether any Evidence ought to be admitted of the Right to this Ticket, claimed by any Perſon who had not complyed with this Statute, againſt the Right of him who had complyed, it was ruled by the Court, that it ought not; and thereupon the Plaintiffs were nonſuited.

Afterwards the Executors exhibited a Bill in the Exchequer, in which they ſet forth the Death of the Teſtator, the Entry of this Ticket in his Books, and all the aforeſaid Matter, and that ſuch Tickets are conſtantly ſold in Exchange-Alley without endorſing any Transfer, but only the Name of the firſt Proprietor; and that ſuch which have not Transfers indorſed, ſell better than thoſe which have many ſuch Indorſements; and that 'tis the common Practice never to make any Indorſement over the firſt Proprietor's Name whilſt theſe Tickets are in Agitation, nor until they come into the Hands of ſuch Perſons who intend to keep them; for if every Transfer ſhould be indorſed, the Tickets would be ſo full of them, that they could be no longer tranſferrable.

Therefore it was inſiſted, that the not Indorſing the Transfer, ſhould not in Equity prejudice the Plaintiffs, it being the conſtant Method of aſſigning ſuch Tickets, not to indorſe the Transfer as aforeſaid.

Econtra.

The Defendant by his Counſel inſiſted, that he purchaſed this Ticket at a Market-rate, and bona fide for a valuable Conſideration in Exchange-Alley, without any Covin or Fraud; and that he had complyed with the Statute, and filled up an Indorſement which was proved by one Mackoy a Broker, of whom he bought this Ticket; and therefore it was inſiſted, that this Bill might be diſmiſſed with Coſts, as having no Equity againſt the Defendant, and for that the Plaintiffs had already been defeated at Law.

It

It being objected against reading the Depositions of Mackoy, for though he is a Broker, and as such might be an Evidence; yet it appears by his own Deposition, that in this Case he did not act as a Broker, but sold the Ticket in his own Right; and because the Defendant may have some Demand against him, if the Plaintiffs should prevail in this Suit; therefore he ought not to be an Evidence for the Defendant, for that in Consequence might be to discharge himself.

But the Court was of Opinion, that his Depositions should be read, for tho' his Evidence might not be admitted before a Jury of Freeholders, for the Reason before-mentioned; yet this Court are proper Judges what Stress or Weight ought to be laid on it.

And after Reading the Answer, and Mackoy's Evidence confirming it in every Thing, the Chief Baron and Baron Gilbert were of Opinion, that the Bill ought to be dismissed; for that every Purchaser of such Tickets who keeps them open after the Purchase, without filling them up with an Endorsement and Transfer according to the Statute, keeps them at his own Risque or Peril; and if they come afterwards into the Hands of a Stranger bona fide, and for a valuable Consideration, who gets a Transfer endorsed as directed by the Statute, he hath an absolute Right to them both in Law, and in Equity; and Baron Gilbert held, that whatever the Court might do, if the Cause was open, and came before them without a Trial at Law; yet there could be no Equity now to set aside, the Nonsuit, because that would be an Admittance, that the Defendant had a legal Right.

The Chief Baron was likewise for dismissing the Bill; 'tis true, if the Testator Devallar, when he purchased this Ticket, had procured a Transfer to himself, and thereby had a legal Right to it; in such Case, if after his Death, the Defendant had purchased it of a Stranger, without acquainting his Executors (the Plaintiffs) therewith, they might have some Equity on their Side, because the Name of their Testator was indorsed on the Ticket; and by that Means the Defendant might have been sure who was the Owner of it, and who had the Power to transfer it to him.

But as this Case is, there could be no Negligence in the Purchaser, for he bought it for a valuable Consideration, and had done every Thing necessary to establish his Right, and could not know that the Plaintiffs Testator had any Right to this Ticket, because there was no Transfer indorsed

to him; therefore by keeping it open without any Transfer, he kept it at his own Risque for any Man to fill up, who came to the Poſſeſſion honeſtly, and without Fraud; ſo that this Bill ought to be diſmiſſed.

Baron Price differed in Opinion, and argued from the Hardſhip of the Caſe; and that the Defendant ſhould have taken Care when he bought this Ticket, of whom he bought it, eſpecially ſince Mackoy, the Seller, had no Transfer to himſelf, but only the bare Poſſeſſion; and ſince the Name of Smith, the firſt Proprietor, was indorſed, he might have been informed whoſe Ticket it was he then bought.

That it was a hard Caſe on both Sides; it was hard for the Plaintiffs (the Executors) that they ſhould loſe their Right, becauſe they did not know it ſoon enough to advertiſe it; and 'tis hard for the Defendant to loſe the Benefit of his Purchaſe.

He put the Caſe of a promiſſory Note, which, if indorſed, and afterwards loſt, and paſſed in Way of Trade to a third Perſon, for a valuable Conſideration; yet the Indorſee might bring an Action of Trover for the Note againſt the third Perſon, which the other Barons did not deny; thereupon it was propoſed by Baron Price, that this Ticket ſhould be divided between the contending Parties, but that was not agreed to; and at laſt the Court took Time farther to conſider till next Michaelmas-Term.

Vernon *verſus* Benſon.

Sign Manual not counterſigned by the Lord of the Treaſury, nor by a Secretary of State, not good.

THIS was a Caſe referred to the Attorney and Solicitor General by the King and Counſel for their Advice, Whether it was reaſonable for the King to revoke a Sign manual and Privy Signet granted to Sir John Fryar, in Truſt for the Defendant Benſon, the ſame being obtained by Surpriſe (as was ſuggeſted in the Plaintiff's Petition) and without a full and due Information.

The Caſe was thus: Lt. Colonel Vernon, Father of the Petitioner Mary Vernon, and great Uncle of the other Petitioner Captain Vernon, was a true Royaliſt in the Civil Wars, and ſold his Eſtate to raiſe a Regiment for the Service of the King, and afterwards ſerved him in his Exile.

After the King was reſtored, he granted to the ſaid Colonel Vernon certain Lands in Cloontarfe in Ireland, now of the Value of 700 l. per Annum; and likewiſe, in Conſideration of his ſaid Services to the Crown, and of his giving the King all

all that Land on which the Fort of Sheerneſs then ſtood, and alſo of 7000 l. in Money, the King by Letters Patent granted to him, and to Rupert Brown, the Honour, Manor, and Foreſt of Weedwood in Fee.

Now, before this Grant made to Colonel Vernon, he was poſſeſſed of ſome of the Offices in the ſaid Foreſt for a long Term of Years then to come, by Virtue of a Grant made thereof to the Duke of Ormond and Earl of Cheſterfield, in Truſt for him, &c.

But the Grant of this Foreſt, as aforeſaid, being apprehended by ſome Perſons at Court to be very exceſſive, there was ſome Intention to revoke it; but it not being done in the Life-time of that King, his Brother and Succeſſor, King James the Second, having the like Intention, a Bill was exhibited againſt the ſaid Colonel Vernon and Rupert Brown; and upon a full Hearing of the Cauſe before the Lord Chancellor Jefferies, aſſiſted by the two Chief Juſtices and Chief Baron, it was decreed, that the ſaid Letters Patent ſhould be vacated, being obtained by a groſs Impoſition on the King in the Value of this Foreſt, which are the very Words of the Decree.

Colonel Vernon intending to appeal to the Houſe of Lords from this Decree, ſoon afterwards died; and upon the Acceſſion of King William to the Crown, it was thought not expedient to reſt his Right to this Foreſt on this Decree; therefore an Act of Parliament paſſed to veſt this Foreſt, and all the Rights and Members thereof in the Crown, no Body appearing in that Seſſions of Parliament to claim any Right the Colonel had therein, or to the Leaſes he had in the ſaid Offices, or to the Lands on which the Fort of Sheerneſs was built, the Heirs and Repreſentatives of the ſaid Colonel being all Roman Catholicks.

But Rupert Brown took Care of himſelf, by obtaining in the ſaid Statute a Saving of his Right; and by a Clauſe therein, (viz.) That he ſhould be paid what Debt was due to him from Colonel Vernon, by Sale of ſome Timber in the ſaid Foreſt, to be ſet out by ſuch Perſons as the King ſhould appoint; and that he ſhould aſſign over ſuch Securities as he had from *Colonel Vernon*, to ſuch Perſon or Perſons as the King by his Sign Manual or Privy Seal ſhould at any Time appoint to recover the ſame.

And Rupert Brown being paid the Debt due to him by the Sale of Timber, this Debt, which was originally due from Colonel Vernon, remained in the Crown.

Thereupon the late Queen granted a Privy Seal to one of her Officers to recover this Debt for her Use; and the Petitioner Mary Vernon having in like Manner petitioned her Majesty as now, and that Petition being referred to the Lords of her Majesty's Council, they represented the Petitioner to the Queen as an Object of her Charity.

But the Queen dying before any Thing more was done pursuant to the said Privy Seal; this Debt due from Colonel Vernon still remained in the Crown by Virtue of the Statute aforesaid; and thereupon the Defendant Benson obtained this Sign Manual, to Sir John Fryar, to recover this Debt in Trust for the said Benson; and likewise another Sign Manual reciting the First, and commanding Rupert Brown to deliver to Sir John Fryar all the Securities he had from Colonel Vernon, and to assign them to Sir John, which was accordingly done by an Assignment of a Judgment of 3500 l. in Ireland, which affected his Estate in Cloontarfe, which Judgment was revived; and the Petitioner Mary Vernon sued to an Outlawry there, and a Scire facias was brought against Captain Vernon, the other Petitioner, who was the next in Remainder after an Estate-tail in the Petitioner Mary, by Virtue of a Settlement made by Colonel Vernon, (the said Mary being now above fifty Years old, and without Issue); thereupon this Petition was exhibited, suggesting the Matter above-mentioned, and that the King was surprised in the Granting this Sign Manual, and not duly informed of the Merits and Services of Colonel Vernon, or of that equitable Demand he might have of the Crown, for the Land on which the Fort of Sheerness was built, or of those Terms for Years still subsisting of, and in those Offices which he had in Weedwood Forest.

And this Petition being referred to the Attorney and Solicitor General for their Opinion, Whether it was reasonable for the King to revoke this Sign Manual and Privy Signet to Sir John Fryar, as obtained by Surprize, and without due Information, as aforesaid.

It was argued in Behalf of the Petitioners, that it was a great Hardship, that the Heirs of Colonel Vernon should be deprived of those equitable Demands they had on the Crown, for the Lands on which the Fort of Sheerness was built, and of the Right which they had to the Leases for Years in the Offices in this Forest, and to have no Manner of Satisfaction for the same, or for any Part thereof; and that 'tis very probable, if the King had been informed of

For the Petitioners.

these Demands at the Time he granted this Sign Manual, he would not have granted it, so 'tis reasonable for him to revoke it, now he is fully apprized of the said Demands.

Besides, this Sign Manual never passed thro' the Offices as it ought to have done, for there is no Copy thereof in the Office of the Secretary of State, or in the Office of the Lords of the Treasury, and therefore not duly issued; and it would be of dangerous Consequence, if the Treasure of the Crown could be disposed by a Sign Manual, without being Countersigned by the Lords of the Treasury, or some other Officers, who are by the Laws of the Land to be a Guard to the King, that he might not be imposed on by any of his Subjects.

For the Defendant.

The Counsel for the Defendant insisted, that this Sign Manual was obtained without any Fraud, and without any Imposition on the Crown, and that this Debt was now vested in the King by Act of Parliament, without any Reservation of the Right of the Petitioners; and if they suffer any Hardships, 'tis not by the Defendant, but by the Statute, who did not, nor could apprize the King of any Right they had, as not knowing they had any; and that if they have any equitable Demands on the Crown, still they cannot have any Right to this Debt, because 'tis vested in the King by Act of Parliament, and therefore they may apply to him to be considered as his Majesty shall think fit.

Now, admitting the Sign Manual was not entered in the Secretaries, or any other Office, nor countersigned by the Lords of the Treasury, or by a Secretary of State; yet since it was fairly obtained, and since it was drawn by the Under Secretary to the Lord Sunderland, who was Principal Secretary of State, and by him sent to Sir Edward Northey, then Attorney General, for his Opinion, and by him approved, and sent back to the Secretary's Office, and all this done before it was signed by the King; in such Case, if the Secretary hath been so remiss as not to enter a Copy of it, his Neglect shall not be prejudicial to the Defendant, who had done all which he ought to do to obtain this Sign Manual.

Besides, the not Countersigning it, doth not make it void, nor the not entring Copies thereof in any of the said Offices doth not make it ineffectual, because the Countersigning or keeping Copies thereof, serves to no other Purpose than to apprize the King, if any other Person should endeavour to obtain a Sign Manual for the same Thing which hath been

already granted, or to ſerve as a Tally to account with the King for his Treaſure; it adds no Force to the ſign Manual; for in Reſpect to the Grantee, 'tis as good before 'tis counterſigned as afterwards; for if it ſhould be otherwiſe, then the Secretaries of State, and the Lords of the Treaſury would have it in their Power to render the King's Grants ineffectual; therefore they are obliged to counterſign the ſame.

Beſides, there is a very good Reaſon why this Sign Manual ſhould not be counterſigned, becauſe this Demand never was any of the King's Treaſure; for 'tis only a Power or Right to bring ſo much Money into the Treaſury; for which the Lords of the Treaſury are not accountable till 'tis actually brought in; for which Reaſons it was inſiſted, that the King ought not to be adviſed to revoke this Sign Manual, tho' it was not counterſigned, and tho' the Attorney General told the Counſel for the Defendant, that he never ſaw any Sign Manual before this, but what was counterſigned.

The Counſel for the Petitioners replyed, that it was abſolutely neceſſary all Signs Manual ſhould be counterſigned either by the Lords of the Treaſury, or by a Secretary of State; otherwiſe great Inconveniencies might happen both to the King and People; for the King might be abuſed into extravagant, nay, into different Grants of the ſame Thing to ſeveral Perſons; and 'tis for that Reaſon the Law appoints he ſhould be guarded by ſuch Counſel as would obſtruct ſuch Grants: for if they ſhould be good without paſſing thro' the uſual Offices, and without obſerving thoſe uſual Ceremonies, it would be a vain Thing to keep ſuch Offices as a Fence to the Crown from any Impoſitions. The Reply of the Petitioners.

And tho' it hath been ſaid on the other Side, and it may be true, that the Counterſigning adds no Strength to ſuch Grants, and that they are good in Reſpect to the Grantee, tho' not counterſigned; and that it would be very inconvenient if the Neglect of the King's Officers ſhould be prejudicial to the Defendant; yet the Counterſigning is a neceſſary Ceremony to be uſed in all the King's Grants, to make them effectual in paſſing any Intereſt to the Grantee, and a Condition without which they cannot paſs any Treaſure out of the Crown.

Now if Counterſigning is neceſſary, it would be a greater Inconvenience to the Publick, if ſuch Grants ſhould be good without being counterſigned, than that the Neglect of the Officer ſhould avoid a Sign Manual, for not counterſigning it, becauſe 'tis the Buſineſs of the Grantee to ſee that the Officer ſhould do his Duty in perfecting and finiſhing the

Grant; but if such naked Grants (as this) should be good to pass the King's Treasure, then those Offices and Officers are of no Use.

For the Defendant.

On another Day the Counsel for the Defendant argued, that this was a good Sign Manual, and effectual to pass the King's Right to this Debt, for tho' it might not be good to pass the King's Treasure; yet in this Case 'tis no more than an Appointment according to the Statute to recover a Debt, and doth not rest on the Foot of other Signs Manual, but receives its Strength from an Act of Parliament, by which the Right to it is vested in the Crown.

This was granted by a Sign Manual of the late Queen, and then, as now, the said Mary Vernon petitioned the Queen to revoke it; and that Petition was referred to the Lords of the then Council, who represented the Petitioner as an Object of her Majesty's Compassion, which in Effect was Giving up her Right, and she may still be an Object of Compassion, but that cannot be a Reason to revoke a Sign Manual fairly obtained; and to complain of any Hardships, is to impeach the Statute which ought not to be done, because 'tis not to be imagined that the Parliament would deprive any Person of a just Right without making some other Recompence; and it may reasonably be presumed, that the Petitioner had no Right, for if she had, that had been the proper Time to claim it, before the Act passed.

But the Truth is, she had no Right; for the Parliament considering how many Years Col. Vernon was in Possession of this Forest, and had received the Profits thereof, might apprehend that to be a good Consideration for his Land on which the Fort of Sheerness was built, and of other Demands he could have; and therefore there was no Saving of any Right in the Statute as to him.

Now as to the Countersigning this Sign Manual, admitting it to be necessary; yet if other Things were done, which amount to a Countersigning, these shall make it as effectual as if it was Countersigned; now this Sign Manual was sealed with the privy Signet, which is always kept in the Secretary's Office, and this is a good Proof, that it passed thro' the usual Offices, and was fairly obtained, and a better Proof than if it had been countersigned by the Secretary himself.

Besides, about two Years after the Granting the first Sign Manual, the Defendant obtained another, commanding Rupert Brown to deliver up Col. Vernon's Securities to Sir John Fryar, which last Sign Manual was countersigned by

the Secretary of State; and a Copy thereof is kept in his Office, which plainly shews that it was not obtained by any Surprize or Misinformation.

The Counsel for the Petitioners argued, that though the first Sign Manual was recited in the second, yet that would not make the first good; for it was never yet heard that the Recital of a void Act in the King's Grant should make it better; but on the contrary, if the second depends on the first, it avoids both, whether the Grant is made by the King, or a Subject. For the Petitioners.

That this Sign Manual being sealed by the Privy Seal, doth not amount to a Countersigning as was alledged on the other Side; for the true Reason of Countersigning is not to shew that the Grant passed through such an Office, but to shew what was done by the Minister of State, for, or in Behalf of the King to whom he is accountable, for his Advice and Conduct in the Office.

Now there being two Secretaries of State, and a privy Signet kept in each of their Offices, the Sealing the King's Grants with the Privy Seal, doth not inform the King, or the Subject which of those Secretaries passed the Grant as Countersigning doth; or if it did, 'tis not so effectual as Countersigning is, to bring a publick Minister to Account for his Misconduct in passing such Grants which ought not be passed, because Countersigning is an Approbation of the Grant, and an implyed Consent and Advice of the Minister to pass it.

As to what was said, that this Sign Manual doth not rest on the Foot of others, because 'tis but an Appointment according to the Statute to recover a Debt, certainly this must be wrong; for though the Statute impowers the King to assign this Demand, it must be intended by a good and effectual Sign Manual, and not by one which is informal or void.

And as to the Representation of the late Queen's Council of the Petitioner to be an Object of her Compassion, which is now said to be a Giving up the Right of the Petitioners; 'tis very true, that since the Statute, the Petitioners have no remedial Right; neither do they insist in their Petition, that they have any Right, but set forth what Services Col. Vernon had done for the Crown, and what Reasons might induce his Majesty to extend his Royal Bounty to them who are his Heirs; and that this Debt being now vested in the Crown, they deserve to have it released more than any other Person can deserve to have it granted.

'Tis

'Tis true, the Representation of these Services, and the Hardships suffered are foreign to the Merits of the Reference now depending, but requisite to induce the King to grant this Reference; therefore the Petitioners did not now rely on those Services, but would leave them to the Consideration of the King in Council; and at this Reference they rely, that this is a naked and informal Sign Manual without any Precedent, and not sufficient to pass the King's Treasure, and consequently ought to be revoked, if it is his Majesty's Pleasure so to do.

Nota. At this Reference the Attorney General said, that he never saw any Sign Manual, but what was countersigned by the Secretary of State, or the Lords of the Treasury, but had seen several not sealed with the Signet or Privy Seal; that he had observed this Difference, (viz.) That where the Sign Manual was only a Direction or Commission to do a farther Act as to make out Letters Patent, there 'tis only countersigned, but not sealed; but where 'tis to be the principal Act it self, there 'tis both sealed and countersigned.

Then one of the Counsel for the Petitioners said, that King William had granted a Sign Manual to the now Defendant, who carried it to the Secretary's Office, when Mr. Vernon was Secretary of State, in order to have it countersigned and sealed, which he refused to do, and would not return the Sign Manual, but kept it; and upon Complaint made to the King, he was attended by that Secretary, who shewed Reasons for his so doing, and the King was satisfyed with the Suppressing it.

After the Death of that King, a Bill was exhibited in Chancery by the now Defendant against Secretary Vernon, suggesting that he the Complainant had obtained such a Sign Manual, which would have been very beneficial to him; but that it was unjustly suppressed by the Defendant Secretary Vernon, and upon hearing the Cause, that Court approved what the Secretary had done, and the Plaintiff's Bill was dismissed.

Sir Lawrence Anderton, Baronet, *versus* Commissioners of the Forfeited Estates.

Whether a Monk professed is capable of Taking an Estate.

UPON an Appeal from the Decree of the Commissioners, &c. to the Delegates, the Case appeared to be thus, (viz.) Sir Lawrence Anderton being the eldest Son of his Father went to Doway, and there became a Monk; thereupon

Francis, the next Brother of Sir Lawrence, assumed the Title, and possessed himself of the Estate of the Family, but being concerned in a Rebellion, and taken Prisoner at Preston in Lancashire, he was tried and found guilty of High Treason; and being pardoned as to his Life, the Commissioners seised the Estate; and thereupon Sir Lawrence (the Monk) claimed it, insisting before the Commissioners, that his Brother Francis had no Right.

The Commissioners having examined Sir Lawrence upon Oath, by Virtue of a Power given them by that Statute, which vests the forfeited Estates in the King; and upon his said Examination, he having confessed he was a Monk, they decreed for the Crown, for that by the Appellant's Profession he was dead in Law, and by Consequence incapable to take; and therefore the Estate must immediately vest in his Brother Francis, who being attainted of Treason, the Estate must be forfeited: And thereupon, by the Opinion of Four of the Commissioners against Three, a Decree was made for the King.

From which Decree Sir Lawrence Anderton appealed to the Delegates, who were Justice Powys, Justice Tracy, Justice Fortescue, Baron Mountague and Baron Page; and the Case was argued at Serjeants-Inn Hall in Fleet-street, by Sir Philip York, Solicitor General in Behalf of the Appellant, and by Sir Robert Raymond, Attorney General, for and in Behalf of the Commissioners.

The Counsel for the Appellant insisted, that there were two Reasons which might induce the Court to reverse this Decree: First, For that it doth not appear that the Appellant is a Monk professed; for tho' upon his Examination he confessed he was a Monk, yet he may be a Monk, and not a Monk professed; but if he was (which is not proved in this Case) yet he is capable of Taking this Estate; for though at Common Law, a Monk professed was dead in Law, and by Consequence incapable of Taking an Estate; yet since such Disability did arise by some Canons of the Popish Church (which was the ruling Church at that Time) and those Canons being now abolished by Act of Parliament; and there is no Means left to try, Whether a Man is a Monk professed, or not; therefore such Profession shall work no Incapacity in any Man to take and enjoy an Estate; so that if it could be proved, that the Appellant was a Monk professed, yet this Decree ought to be reversed. For the Appellant *Sir Lawrence Anderton.*

On the other Side it was argued for the Respondents, that the Appellant being taken into and living in a Convent in foreign Econtra

foreign Parts, there could be no possible Means of proving him a Monk, but by his own Confession; and he having upon his Examination confessed himself to be a Monk, it must necessarily follow he is professed, because he is not a Monk till Profession.

And as a Monk professed was by the Common Law of England made incapable of taking or enjoying an Estate, because he was accounted dead in Law; so it was not by the Canons alone of the Popish Church, but even by the Common Law of this Nation, that such Incapacity did arise; therefore the same Disability still remains, unless it can be shewed that there is some Statute which enables a Monk professed to take and enjoy an Estate, which they do not on the other Side pretend to shew.

For the Appellant. The Solicitor General replied, that, if to say a Man is a Monk, must imply, that he is a Monk professed, then the constant Addition of that Word in our Law-Books would be impertinent, which it is not, for 'tis always used to shew the Difference between a Monk and a Monk professed.

But admitting the Appellant is a Monk professed, yet the Law, as now established, doth not take any Notice of such Profession; and if it was a Disability, 'tis not so now, because there is no Method of trying, Whether a Man is a Monk professed, or not, for the Trial at Common Law was by the Certificate of the Bishop; but as the Law now stands, no Bishop can certify a Profession of being a Monk; therefore it would be a very great Hardship if this should work an Incapacity, when there is no Means of Trying it; and if it cannot be tried, then 'tis plain that the Law doth not take any Manner of Notice of it.

The Decree was reversed by the Delegates, so far as to order, that the Appellant might bring an Ejectment against the Commissioners, and try his Title at Law; and that the Decree should not stand in his Way.

But in a little Time afterwards Sir Lawrence took the Oaths, and received the Communion according to the Church of England, and became a Protestant, and so enjoyed his Estate without any farther Trial.

DE

Term. Sanct. Mich.

10 Georgii. In Cancellaria.

Newland *verſus* Sheppard.

THE Plaintiff married the Daughter and Heir of Sheppard, a Freeman of London, by whom he had Iſſue one Son and ſeveral Daughters, which ſaid Freeman, by his Laſt Will, deviſed his Freehold Lands to the Defendant his Wife, for Life, Remainder to his Grandſon (who was the Son of the Plaintiff) for Life, Remainder in Tail to his firſt Son, &c. with like Remainders to his Grandaughters, according to their Seniority, and not as Coparceners; and as for his perſonal Eſtate, he deviſed, that after his Debts and Legacies were paid, the Reſidue ſhould be placed out at Intereſt, and that the ſaid Intereſt ſhould be paid to his ſaid Grandchildren, Share and Share alike, until they were of the Age of twenty-one Years, but did not diſpoſe of the Principal.

A Freeman of *London* having one Daughter, and ſeveral Grandchildren by her, deviſed his perſonal Eſtate to pay Debts and Legacies; and afterwards what remained, to be ſold, and the Money ariſing by Sale, (*viz.*) The Intereſt to be paid to his Grandchildren, Share and Share alike till of Age, but did not diſpoſe the principal Sum; and now his Daughter, who was Heir at Law, and her Husband, exhibit a Bill to have the Principal.

And now the Plaintiff exhibited his Bill to have 2000 l. Part of the Portion of his Wife, which was unpaid at the Time of the Death of her Father, the ſaid Teſtator, with Intereſt for the ſame in Nature of a Creditor, and for an Account of his perſonal Eſtate, which by the Cuſtom of London did belong to his (the Plaintiff's) Wife, as only Child to the Teſtator, her Father, who had made no Diſpoſition thereof.

The Defendant, the Widow, owned in her Answer, that the Testator was a Freeman of London, but insisted that the Plaintiff's Wife was advanced in his Life time, and so is not entitled to any Part of his personal Estate, unless she puts her Share in Hotchpot, and she submits to pay the 2000 l. but without Interest, and insists on the Devise of the real Estate to her for Life, &c.

And on Reading the Proofs it appeared, that the Portion of the Plaintiff's Wife carried Interest from the Day of her Marriage, tho' Part of it was not payable in several Years after.

Whereupon it was decreed, that the said 2000 l. with Interest, should be paid, and that an Account be taken by the Master, what the Testator died worth, and then the Court would consider what was to be done with the principal Money not disposed; but declared, that it would be a hard Construction of this Will, that the Grandchildren should have the Interest thereof during their Minority, and no Share of it when they came of Age.

And as to the Measure of the Account to be taken by the Master, it being insisted, that it should be according to the Computation of the Value of the personal Estate at the Time of the Death of the Testator, and not as lessened by any Accident; the Court declared, that if the Estate had encreased in the Hands of the Executor, the Plaintiff would have expected the Benefit of such Increase; and 'tis but equitable that he should be contented with the Loss; but that being occasioned by the South Sea Company, the Act of Indemnity discharges all Trustees and Executors: And as to the principal Sum undisposed, the Court took Time to consider of it, in Respect to the Children, till the Master had made his Report.

Ashton *versus* Bretland.

Bill to be relieved against a Covenant in a Lease, as not drawn pursuant to the Covenants in an old Lease.

THE Plaintiff exhibited a Bill against the Defendant to be quieted in the Possession of certain Lands, which he held by Lease under the Defendant, who had brought an Ejectment, and endeavoured to turn him (the Plaintiff) out: The Case was as followeth:

Serjeant Bretland granted a Lease of these Lands to one Ashton for ninety nine Years, if three Lives (naming them) or any of them should so long live, which Lease was granted upon a Surrender of an old Lease of the same Lands to the Ser-

jeant, and was to be pursuant to the Covenants in the old Lease, one of which was, that it was mutually covenanted, that upon the Death of any of the three Lives, the Lessee should surrender the old Lease, if it was his Will so to do; and thereupon the Serjeant covenanted, that upon such Surrender and Payment of an Heriot, and eight Pounds, he would grant a new Lease for three Lives, &c.

Now in this new Lease, the Covenant was drawn, that Ashton, on the Death of any of the three Lives, would absolutely surrender the same, and pay an Heriot and eight Pounds; and one of the Lives being now dead, and the Plaintiff refusing to surrender this Lease, and renew it upon Payment of the said Heriot and Fine, the Defendant brought an Ejectment, and the Plaintiff exhibited this Bill, and got an Injunction, the End of which Bill was to be relieved against the Covenant in the new Lease, and that for two Reasons.

First, Because Serjeant Bretland had so settled his Estate, that the now Defendant was only Tenant for Life, and by Consequence if he should surrender the Lease, the Defendant had no Power to grant a new Lease for three Lives; so that since the Plaintiff cannot have the Benefit of the Covenant for his Advantage, 'tis not reasonable that he should be obliged to the Performance of that Part of the same Covenant to his Disadvantage; and that the Defendant should be at Liberty to take any Advantage of a Disability occasioned by his being made Tenant for Life.

2. It was suggested in the Bill, and likewise proved, that this new Lease differed from the old Lease, which was to be the Rule of the new one; for that it was drawn by the Serjeant himself with a Covenant, that the Lessee should absolutely surrender the same upon the Death of any of the Lives, and to pay an Heriot, and 8l. when the old Lease was to surrender, if it was his Will so to do, which is not obligatory, but left to his Discretion; but by the new Lease he is bound to surrender, and renew, and pay an Heriot and Fine upon the Death of every Life.

All which appearing on Proofs, the Lord Chancellor decreed, that since the Plaintiff was a Purchaser of this Lease (as every Lessee is) the subsequent Settlement made by the Serjeant, by which the Defendant is made Tenant for Life, shall not prejudice him (the Plaintiff) nor forejudge him of the Benefit of any Covenant in his Lease; so as to that Point, there is no Reason to excuse the Plaintiff for Nonperformance of the Covenant on his Part, because the De-

fendant is to all Intents capable to perform that Covenant on his Part.

But as to the second Point 'tis clear, that the Serjeant himself (who drew the new Lease) did draw it in a different Manner from the old one, which should have been the Standard to guide him, and that it was drawn for his own Advantage, but in Equity it shall be taken as if it had squared with the old Lease; so that if the Lessee is not willing to renew, he shall be quieted in his Possession under the new Lease, as if he held by the old Lease.

Mead *versus* Caswell.

A Goldsmith's Note was given in Part of Payment of Money on a *Saturday*, and not offered to the Drawer till *Monday* following; this is no new Credit given to the Drawer, but that the Indorsor is still liable.

THIS was a Bill brought by the Plaintiff to be relieved against a Verdict and Judgment at Law, in which the Case upon the Pleadings was thus, ff.

The Plaintiff Anno 1720. gave a Note drawn by Cox and Cleve Goldsmiths, for 1758 l. to the Defendant in Part of Payment of Money due to him (the Defendant) from the Plaintiff.

That 'tis a Custom amongst the Goldsmiths in London, to balance their Accounts every Day, but especially on every Saturday, when they clear up the Accounts of the whole Week.

That this Note was delivered to the Defendant on a Saturday about eleven of the Clock in the Morning, and he might have received the Money that very Day of the Goldsmiths; but he did not offer the Note to them till the next Monday, and then about ten in the Morning he offered it, which the Cashier cancelled; and the Servant might have received the Money (as the Plaintiff suggested) if he had staid, for that the Goldsmiths Cox and Cleve had paid above 20000 l. that Morning, but the Servant went away; so that it was tho' the Defendant's Negligence, the Money was not paid, and that his Delay from eleven a Clock on Saturday, till five in the Afternoon of the Monday following, was a new Credit given by him to those Goldsmiths; and for that Reasons, he (the Plaintiff) insists, that the Defendant shall not have Recourse to him (the Plaintiff,) and the rather, because his Note was cancelled by the Cashier, who gave another Note of the same Date, and for the like Sum at five of the Clock in the Afternoon of that Monday; but it was after those Goldsmiths were become Bankrupts; upon which Note the Verdict, and Judgment was had; and the

Plaintiff inſiſts, that he cannot by Virtue of ſuch Note be accounted by the Commiſſioners of Bankrupts to be a Creditor to theſe Goldſmiths within any of the Statutes of Bankruptcy, though this Note bears even Date with the original Note ſo cancelled; for that the Time of making it is the true Date, which was after they were Bankrupts.

On the other Side it was confeſſed, that this Note was received by the Defendant on a Saturday, and that the Cuſtom amongſt Goldſmiths in London is as ſuggeſted by the Plaintiff; but that 'tis likewiſe the Cuſtom amongſt them, for one Servant to go every Day to offer all the Notes paſſed to his Maſter that Day to them who drew ſuch Notes, and to receive the Money; and when he returns home to make a ſeparate Entry of all which he received, and then to pay it over to the Caſhier.

That on that very Saturday, the Defendant had received ſeveral Goldſmiths Notes as Payment, and which were drawn by them who lived at Charing-Croſs, Covent-Garden, and in the Strand, which Notes he ſent by his Servant on that very Day to the ſeveral Goldſmiths who drew the ſame in that Part of the Town, and his ſaid Servant did on that Saturday receive of thoſe Goldſmiths 12000l. for his (the Defendant's) Uſe, in his way of Trade.

That 'tis likewiſe a Cuſtom amongſt Goldſmiths not to pay any Money after five of the Clock in the Afternoon, but to employ the reſt of the Day in adjuſting their Accounts, and that his Servant returned from that End of the Town on that Saturday about Half an Hour after four, and began to enter in his Books all the Sums he had then received; but before he could make an End, the Hour was paſt for Payment of Money amongſt Merchants, which was the Reaſon he did not offer this Note on Saturday to the Goldſmiths who drew it.

That on the next Monday Morning, he ſent his Servant with the Note to the Drawer, and gave him no Order to ſtay, only to demand Payment of the Money; but that he accordingly offered the Note to the Drawer, which the Caſhier cancelled, and deſired the Servant to call in Half an Hour, for that Cox and Cleve were gone to the Bank to receive Money.

Thereupon the Servant went away, and returned within Half an Hour, and not receiving the Money at that Time, he called twice more at the Shop, and not receiving any, he returned to his Maſter (the Defendant) and told him that the

the Goldſmiths could not pay it; whereupon the Defendant went to their Houſe, and finding the Note cancelled, he had no Remedy, but procured a new Note of the ſame Date with the original Note, and for the ſame Sum; on which he obtained a Verdict and Judgment, and inſiſted, that the Note is no Payment of the Money, unleſs the Defendant had given the Goldſmiths ſome new Credit, which he denied that he had given; and therefore inſiſted to have this Bill diſmiſſed with Coſts, and to be at Liberty to take out Execution on his Judgment.

Curia. The Court decreed, that though it appears there was ſome Negligence in the Defendant's Servant, in not ſtaying to receive the Money on Monday Morning, when the Caſhier cancelled the Note in his Preſence, yet it would be hard to make the Defendant ſuffer thereby; therefore the Court diſmiſſed the Bill with Coſts.

Aliſon's *Caſe*.

The Mother gave a Bond to her Son conditioned to ſurrender a Copyhold Eſtate to him, of which ſhe was Heir; decreed that ſhe was a Truſtee for her Son.

THE Plaintiff exhibited a Bill againſt her Niece for a Moiety of a Copyhold Eſtate, which ſhe claimed in Coparcenary with her ſaid Niece, by Deſcent from T. A. her Brother; the Caſe was thus:

ſt. One Aliſon the Plaintiff's Uncle was ſeiſed of the Inheritance of a conſiderable Copyhold Eſtate, and having no Iſſue, intended to leave it to his Nephew T. A. the Plaintiff's Brother; but being taken ill, he had no Time to ſurrender to the Uſe of his Will, and for Want thereof, the Eſtate would deſcend to his Siſter, who was his Heir at Law, and Mother of the Plaintiff; and to prevent ſuch Deſcent, the ſaid Aliſon procured his ſaid Siſter to enter into a Bond of 2000 l. to the ſaid T. A. her Son, conditioned that at any Time upon his Requeſt, ſhe would convey the ſaid Copyhold Lands to him and his Heirs.

Purſuant to this Agreement, T. A. entered after his Uncle's Death, but without any Conveyance from his Mother, and ſometime afterwards he died without Iſſue, but had two Siſters; one of them entered and ſurrendered to the Uſe of her Will, and deviſed this Eſtate to her Grandaughter, and died; and now the ſurviving Siſter exhibited this Bill to have a Moiety of the Eſtate in Coparcenary with her Niece, as Heir to her Brother T. A. deceaſed.

The Counsel for the Plaintiff insisted, that upon the Foot of the Agreement with her Uncle Alison, and the Bond of 2000 l. which his Sister gave to surrender at any Time when T. A. her Son should require it, that she shall be deemed as a Trustee for her Son, especially since she had carried the Agreement into Execution, by permitting him to possess the Land during her Life, tho' she was Heir at Law to her Brother Alison.

And this is a stronger Case, than that where the Father being about to make his Will, and intending to make an Executrix, his Son said, that if he (the Father) would appoint him (the Son) to be Executor, it would give him some Countenance in the World; and that if his Father would do so, he (the Son) would be only a nominal Executor, and that his Mother should have the Benefit of it; whereupon he was made Executor; but after the Death of his Father he insisted on the Benefit of the Executorship, which was set aside by the Decree of this Court made by the Lord Chancellor Cowper, upon Proof of this Promise, tho' there was nothing in Writing.

A Promise, tho' not in Writing, was decreed to be made good. Thynne *of* Egham's *Case*. 1 Vernon.

And in the principal Case the Lord Chancellor decreed, that the Mother was a Trustee for her Son, and therefore that the Defendant should surrender to the Use of the Plaintiff, and both of them to be admitted as Coparceners.

Waller *versus* King.

THIS was a Bill brought against the Defendant to set aside an Award, and also a Judgment and Execution got on a Bond, and a Warrant of Attorney extorted from the Plaintiff Waller by Duress, and to have Restitution of the Money levied by Sale of Goods taken in Execution; in which the Case was:

A hard Award not set aside, tho' made without the Knowledge of one of the Parties.

1. The Plaintiff Waller was arrested at the Suit of the Defendant, and thereupon both Parties submitted all Differences between them to two Arbitrators, and that if they could not agree in an Award, then to an Umpire; and the Arbitrators not agreeing, the Umpire awarded 36 l. to be paid by the Plaintiff to the Defendant, without Hearing the Plaintiff; thereupon an Action of Debt was brought against him for Non-performance of the Award; and being under an Arrest, a Bond was extorted from him, and a Warrant of Attorney thereon to confess Judgment, which was entered and

and Execution taken out, and Goods were levied to the Value of 40 l. all which the Plaintiff prayed might be set aside.

The Defendant in his Answer set forth, that he held Lands by Lease under the Plaintiff; and that being indebted to several Persons, the Plaintiff (his Lessor) perswaded him (the Defendant) to make over his Goods, and to deliver up his Lease to him (the Plaintiff) on Purpose to protect the same against his Creditors, which was done accordingly; but that the Plaintiff abused the Trust, and insisted, that the Goods were his Own, by an absolute Surrender made thereof by the Defendant; and this being the greatest Cause of Difference between them, it was referred to Arbitration; and all this Matter appearing to the Arbitrators in the Presence of the Umpire, he made the Award, &c.

The Counsel for the Plaintiff argued, that the Award ought to be set aside, because it was made without the Privity of the Plaintiff, and therefore he could make no Defence against it; and that it was a very unreasonable Award, because it appeared upon the Proofs, that the Plaintiff had Goods of the Defendant, to the Value only of 7 l. 10 s. and no more, and yet he was awarded to pay 36 l. which is a very hard Award.

Curia. The Court would not set aside the Award upon Account of any Hardship therein, because the Arbitrators were Judges of the Party's own Chusing, and the Plaintiff had Notice, and might have been heard if he pleas'd; therefore it was decreed, that the Bill should stand dismissed, with Costs.

Wright *versus* Hobert.

UPON an Appeal from a Decree of Commissioners of Charitable Uses; the Case was:

Decree of the Commissioners of Charitable Uses reversed.

ſſ. A certain Piece of Land called the Lizard, in the Parish of Wimmerton, containing about forty Acres of Pasture, was formerly the Inheritance of two Persons, who several hundred Years past conveyed the same to Trustees, and their Heirs, to the Use of themselves, and the Survivor of them, for Life; and after their Decease, to the Intent that as many of the Inhabitants of that Village as were able to buy three Cows, might put them there to grass in the Day-time, from the first Monday in May to the first Day of August, for ever; and from that Day to be in Common for all the

Inhabitants there till Lady-Day following, and then to be incloſed for raiſing the Graſs till the firſt Monday in May for ever.

But this Grant not appearing before the Commiſſioners, it was pretended that the Lands were given to the Poor of that Pariſh; and that about One hundred Years paſt, the Town, and the Church where this Grant was kept, was burnt; and ſo the Evidence, that it was given to the Poor, was deſtroyed by Fire.

Whereupon the Commiſſioners decreed, that Sir John Hobert, who was Lord of the Manor, ſhould make a Feoffment of theſe Lands, to the Uſe of himſelf and others, and their Heirs, in Truſt, to put out ſome of the poor Boys of that Pariſh every Year to ſome Trades.

From which Decree the Plaintiff appealed, and objected againſt it, that there was no Proof before the Commiſſioners, that this Land was given to the Uſe of the Poor of that Pariſh; ſo that they had no Power to make ſuch a Decree.

And now, upon producing the original Grant before the Commiſſioners (which was not burnt, as it was ſuggeſted) it appeared to be as above-mentioned, by which no Manner of Difference was made by the Grantors between the rich and the poor Inhabitants of that Village.

The Court was not ſatisfied why this original Grant was not produced before the Commiſſioners, but ſaw no Colour to judge that theſe Lands were given to the Uſe of the Poor, for that by the Grant it ſelf the contrary appeared; and it was proved, that the Uſage had been according to the Grant for ſixty Years paſt; therefore there being no Proof that this was given to the Poor, excluſive of the Reſt of the Inhabitants, the Commiſſioners had no Authority to make ſuch a Decree, for which Reaſon it ought to be reverſed.

And it was decreed, that every Inhabitant who had three Cows, ſhould put them to graſs on theſe Lands, &c. as in the original Grant, &c.

That if this Manner of Grazing had been by Preſcription or Uſage, no Perſon but the Inhabitants of antient Meſſuages could be entitled to it; but 'tis otherwiſe appointed by the Grant of the Donors; and that there is no Colour of Coſts againſt the Commiſſioners, who conteſted nothing in their own Right; not but that the Court would have puniſhed them, if it had appeared they intended to oppreſs.

Anonymus.

Exemplification of a Sentence given in a foreign Nation ſhall be read as Evidence here, that ſuch Sentence was given there without any farther Proof.

THE Caſe, ſt. The Teſtator, who lived in Holland, and who was ſeiſed of a real Eſtate there, and of a conſiderable perſonal Eſtate in England, deviſed all his real Eſtate to the Plaintiff, and all his perſonal Eſtate to the Defendant, whom he made Executor, and died.

But at the Time of his Death he owed ſome Debts by Specialties, and ſome by ſimple Contract in Holland, and had no Aſſets there to ſatisfy thoſe Debts, other than by his real Eſtate, which, by the Cuſtom and Laws of Holland is made liable to the Payment of Debts upon ſimple Contract as well as upon Specialties, if there are not perſonal Aſſets to anſwer the ſame, eſpecially Debts upon ſimple Contract for Servants Wages, or for Work done.

Now the Creditors in Holland ſued the Plaintiff there, to whom the real Eſtate was deviſed, and had a Sentence againſt it, by Virtue whereof it was ſold for the Payment of their reſpective Debts.

Thereupon the Plaintiff exhibited this Bill againſt the Defendant, who was Executor, and to whom the perſonal Eſtate was deviſed, as aforeſaid, that he (the Plaintiff) might be re-imburſed by the Defendant for the Loſs he had ſuſtained in not bringing the perſonal Eſtate to Holland to diſcharge the Debts there in Aid of the real Eſtate.

The perſonal Eſtate muſt come in Aid of the Real.

Upon hearing this Cauſe, the Plaintiff produced an Exemplification of the Sentence in Holland, under the Common Seal of the States, in Evidence, without any farther Proof, that ſuch Sentence was given there, for which Reaſon the Counſel for the Defendant objected againſt the Reading it; and this upon the Authority of the Caſe of Swinnerton *verſus* Goddard, in the Houſe of Lords, where it was ſettled, that the Exemplification of any Judgment or Sentence in any Court, where the Proceedings were by different Laws from the Laws of England, ſhould not be given in Evidence without farther Proof.

Swinnerton v. Goddard.

That Caſe was as followeth, (viz.) Swinnerton being a Scotſman, and here in England became indebted to Mr. Goddard, who obtained a Judgment in the Court of King's Bench againſt him; thereupon Swinnerton retired to Scotland, where he had ſome Effects; and Mr. Goddard got an Exem-

plification of his Judgment here, which he produced in Evidence before the Lords of the Seſſion in Scotland, upon a Suit he brought there againſt Swinnerton; but that Court would not admit it to be read without farther Proof, but gave Sentence againſt Mr. Goddard; who thereupon appealed to the Houſe of Lords here, and the Sentence of the Lords of the Seſſions was affirmed; and in the Affirmance of that Sentence, a parallel Caſe was cited, where in an Appeal from Ireland; for that the Lord Chancellor there had founded his Decree on the Exemplification of a Sentence given by the Lords of the Seſſions in Scotland, without any farther Proof, that Decree was reverſed in the Houſe of Lords here, for that, and for no other Reaſon.

On the other Side it was inſiſted, that Judgments are transferrable by Exemplifications from one Court to another, and this is ſeen by daily Experience where Judgments in the Civil Law Courts, as in the Admiralty, are transferrable to other Courts, &c. Econtra.

The principal Caſe differs from that of Swinnerton and Goddard; for the Plaintiff doth not make the Exemplification of the Sentence in Holland, the Ground of his Demand, farther than to ſhew, that there was a Sentence there, for he muſt give the Will and other Proofs in Evidence to make out his Right, and then to ſhew how he was damnified. Curia.

The Plaintiff complains of a Sentence given in Holland, and certainly he muſt be allowed to prove, that there was ſuch a Sentence, and this is done by the Exemplification of it, and he doth not found any Demand here upon the Sentence it ſelf; but 'tis only to ſhew the Court that he ſuffered there, and he muſt give other Proof to ſhew, that it was occaſioned by the Defendant, and in what Manner; for that is the Ground of the Complaint in this Court, and not any Wrong by the Sentence it ſelf.

Now by the Laws of Holland, all Debts ſhall affect the real Eſtate there, but 'tis there, as it is here, that the perſonal Eſtate ſhall come in Aid of the real Eſtate, and be charged in the firſt Place; therefore the perſonal Eſtate in this Caſe ſhould anſwer the Loſs, the Plaintiff ſuſtained by the Sale of the Real Eſtate, tho' that happened in a different Dominion.

Therefore it was decreed, that the Plaintiff ſhould be reimburſed. *See* Brook *Cuſtom* 43.

S.C. 10. Mod. 513 Acherley *verſus* Vernon.

Where a Will ſhall not be revoked by a Codicil.

Where by a Deviſe of Lands, the Fee-Farm Rents will paſs: And where by a Deviſe of all his real Eſtate Copyholds will paſs.

THIS was a Bill exhibited by Roger Acherley, Eſq; and his Wife, and Lætitia their Daughter, the Wife being Siſter and Heir at Law to Thomas Vernon, Eſq; deceaſed.

The Bill ſets forth, that Thomas Vernon was ſeiſed in Tail of ſome Lands, and of other Lands for Life; and was poſſeſſed of a perſonal Eſtate to the Value of Eighty Thouſand Pounds at the Time of his Death; and being ſo ſeiſed and poſſeſſed, he made his laſt Will Anno 1711. and thereby after ſome Legacies given to particular Perſons, he deviſed all his real and perſonal Eſtate to four Truſtees (naming them) in Truſt, that they ſhould permit the Defendant Bowater Vernon to receive the Profits of his real Eſtate for Life, Remainder to his firſt Son in Tail, &c. and that the ſaid Truſtees ſhould lay out his perſonal Eſtate in a Purchaſe of Lands, which when purchaſed, ſhould be ſettled to the ſame Uſes, &c. and he deviſed to his Siſter (the now Plaintiff) Mrs. Acherley 200 l. per ann. during her Life; and a little before his Death Anno 1720. he made a Codicil, and thereby confirmed his Will, except ſuch Part as was by the ſaid Cordicil revoked, and then he revoked that Part of his Will, wherein Mr. Acherley (the now Plaintiff) and one *Mr. Vernon* were made Truſtees, and appointed Mr. Keck and Mr. Nicholls to be his Truſtees; and deviſed to his Niece Lætitia Acherley 6000 l. and declared, that the ſame, and the Annuity of 200 l. per ann. which by his Will, he had deviſed to his Siſter for Life, ſhould be in lieu of all Demands, they or either of them might claim of, or unto all or any Part of his real or perſonal Eſtate; and upon Condition they ſhould releaſe to his ſaid Truſtees all their Right thereunto, and all the reſt of his Lands which he purchaſed ſince the making his Will, and all other his real Eſtate he deviſed to his ſaid Truſtees to be ſettled according as in the Will.

The Plaintiffs by their ſaid Bill inſiſted, that by this Codicil, the Teſtator had revoked a great Part of his Will, and had made no other Diſpoſition of what he had revoked, and conſequently that the ſame ought to deſcend to the ſaid Mrs. Acherley as his Heir at Law; and that having purchaſed ſome Fee-Farm Rents, iſſuing out of the Manor of Hanbury; and having entered into Articles for the Purchaſe of ſeveral Lands lying in the Counties of Worceſter, War-

wick, and Leiceſter, ſince the making his ſaid Will, the ſaid Rents and the Lands which reſted in Articles, would not paſs by the Deviſe of all the reſt of his Lands, &c. in the Codicil; and therefore muſt likewiſe deſcend.

And that the ſaid Teſtator had ſome valuable Manuſcripts of Caſes decreed in the Court of Chancery whilſt he attended that Court, which the Plaintiffs now claim as their Right, in order to have them publiſhed in the beſt Manner, as a Monument of his great Learning to be tranſmitted to Poſterity, and that 'tis a Right veſted in them before any other Perſon whatſoever, being his Heirs at Law; and therefore ſhall deſcend to them in Nature of Heir-looms.

The Defendant Bowater Vernon by his Anſwer confeſſes the Will, and that after the Making thereof, the Teſtator bought ſeveral Lands, and entered into Articles for the Purchaſe of more, and that Part of the Purchaſe-Money was paid; and having encreaſed his perſonal Eſtate, he made a Codicil as ſet forth in the Bill; but inſiſted, that ſo much of his Eſtate as reſted in Articles ſhall paſs in Equity by the Deviſe of all his new purchaſed Lands in the Codicil; and ſo ſhall the Fee-Farm Rents, iſſuing out of the Manor of Hanbury; for that they were afterwards merged in the Purchaſe of that very Manor by the Teſtator himſelf, who at the Time of his Death, and long before, was Lord thereof. The Defendant's Anſwer.

And farther inſiſts, that by the Codicil none of the Deviſes in the Will are revoked, but rather confirmed, but if it ſhould be a Revocation of what was deviſed by the Will; yet the Lands ſhall paſs by that Clauſe in the laſt Part of his Codicil where he deviſed all the reſt of his Lands, &c. to his Truſtees, &c. ſo that he left no Part of his Eſtate, either real or perſonal undiſpoſed.

And as for the Manuſcripts, he ſubmits to the Opinion of the Court, whether the Truſtees ſhould have the Publiſhing them, to whom the Teſtator had entruſted the reſt of his real and perſonal Eſtate.

The other Defendant Mrs. Vernon, the Widow of the Teſtator, by her Anſwer ſays, that he left her an Annuity or Rent-Charge of 1000 l. per Annum, during her Life, beſides what Lands were about his Houſe at Hanbury, whilſt ſhe lived therein nine Months in every Year; and the Houſhold Goods and Furniture of his Houſe in London, which ſhe inſiſts to have ſecured to her as the Court ſhall think fit.

She

She likewiſe claims 200l. which was left to her by her Father Sir Anthony Keck, to be laid out in what ſhe thought fit in Remembrance of him, which 200l. ſhe believes was received by the Teſtator; and therefore inſiſts to have it ſatisfied out of his perſonal Eſtate.

And as for the Manuſcripts, ſhe claims them as Part of the Teſtator's Houſhold Goods, deviſed to her for her Life, ſo that ſhe inſiſts on her Right to them, that they may be publiſhed for the Credit of the Teſtator, and not that ſhe claims the leaſt Benefit by them.

There was a Croſs Bill exhibited againſt the Plaintiffs in the original Bill, which charges, that Mr. Acherley and his Wife have received the Annuity of 200l. per ann. deviſed to the Wife on the Condition mentioned in the Codicil, ſo that they are thereby concluded from any farther Demand of the Teſtator's Eſtate; but ſhall be obliged to perform the Condition and Releaſe, as therein is directed.

And farther, that the Legacy of 6000l. deviſed to the Plaintiff Lætitia, is ready to be paid on the Condition aforeſaid; and therefore that ſhe ought to determine her Election, whether ſhe will accept the Legacy upon the ſaid Condition, or renounce it, and take what Benefit ſhe may have by her Title to a diſtributive Part of the Teſtator's perſonal Eſtate.

The Queſtions ariſing upon theſe Pleadings were:

(1.) Whether the Revocation in the Codicil of that Part of the Will where Mr. Acherley and Mr. Vernon were made Truſtees, and appointing others, had revoked all the Diſpoſitions in that Clauſe of the Will.

(2.) Whether the Lands which the Teſtator had articled to purchaſe, and likewiſe the Fee-Farm Rents of which he was ſeiſed, and which were not mentioned either in the Will or Codicil, ſhall paſs by the Deviſe of his Lands in the Codicil.

(3.) The Teſtator having both Freehold, Leaſhold and Copyhold Lands, and having in his Will, declared a Truſt only of his Freehold and Leaſhold Lands without mentioning his Copyholds, whether any Truſt thereof ſhall reſult to the Benefit of the Heir at Law.

For the Plaintiffs. As to the firſt Point it was argued, that by revoking that Part of his Will where Mr. Acherley and Mr. Vernon were Truſtees, he had revoked all the Diſpoſitions in his Will, becauſe they were Truſtees in all of them, for he did not

revoke the Truſt to them, but that Part of his Will where they were Truſtees, which is every Part; for they were concerned throughout the Will; and tho' by the Codicil he deviſed the Reſt of his Lands to Mr. Keck and Mr. Nicholls, yet he having declared no Truſt thereof, they ſhall be ſeiſed of a reſulting Truſt for the Heir at Law.

'Tis for his Benefit that Revocations are favourably conſtrued, to bring back the Eſtate to him; and the ſame Words in a Limitation of an Eſtate have been enlarged in Favour of the Heir at Law, and ſtreightned in the Conſtruction, when againſt him; as for Inſtance; in the Caſe of * Nottingham *verſus* Jennour.

* This was a Deviſe of Lands to his ſecond Son, *and his Heirs*, for ever, and for *Want of ſuch Heirs*, then to the right Heirs of the Teſtator, who died, and ſo did the ſecond Son without Iſſue, living his elder Brother: Adjudged, that the ſecond Son had an Eſtate-tail, and no more; becauſe theſe Words, *And for Want of ſuch Heirs*, are void in Point of Limitation, and import no more than *Want of ſuch Iſſue*, becauſe the ſecond Son could never die without Heirs, ſo long as his Brothers, or any Heirs of his Father were living; therefore the Heir at Law, in this Caſe, ſhall take by Deſcent, and not by the Will. *Salk.* 233.

So where a Man releaſes Part of a Bond, 'tis a Releaſe of the whole Bond; and by the ſame Reaſon a Revocation of Part ſhall be a Revocation of the Whole.

(2.) By the Deviſe in the Codicil of the Lands purchaſed ſince the Making his Will, the Lands for which he had articled ſhall not paſs, either in Law or Equity, as this Caſe ſtands, becauſe the Time of Conveying them to the Teſtator was not come before his Death, ſo that he had no conſummate equitable Intereſt therein, and conſequently could make no Diſpoſition thereof.

Nor ſhall the Fee-farm Rents paſs by a Deviſe of all his Lands ſince purchaſed, for there are no deſcriptive Words thereof to make them paſs; beſides, Rents cannot paſs by a Deviſe of Lands, unleſs where the Teſtator had no Lands, for in ſuch Caſe they ſhall paſs to make the Words of the Will operate; and as for the Fee-farm Rents which iſſued out of his own Manor, they were not extinguiſhed, but only ſuſpended during his Life, for they could not be merged, becauſe his Wife had an intermediate Eſtate for Life in the Manor.

Now, to conſtrue, that Rents ſhall paſs by a Deviſe of Lands, is a very hard Conſtruction in Favour of a voluntary Deviſee, againſt an Heir at Law, and there is not a Caſe in any Law-Book to warrant it; 'tis true, there is a Caſe in Leonard, where it was held, that by the Deviſe of a Manor the Rent paſſed, but it was becauſe the Teſtator had no other 2 Leon. 41.

Right

Right in the Manor, but this Rent; and therefore the Devise had been void if the Rent did not pass.

(1.) Object. But if it should be objected, that by a Devise of Lands all his Interest therein would pass, this is contrary to several Resolutions in the Law; besides, where the Words are doubtful, the Heir at Law shall not be disinherited.

Answer.

(2.) Object. If it should be likewise objected, that upon an Elegit de medietate terræ, by the Statute of Westm. 2. Rents were extendible, that Case in * Cro. Eliz. doth not warrant it; therefore no Inference can be made from thence, that by a reasonable Construction Rents shall pass in a Will by a Devise of Lands.

* Cro. Eliz. 656.

Answer.

Now, in that very Case in Croke, 'tis said, that a Rent-seck would not be extendible; and since the Statute Quia emptores terrarum, if a Man giveth Lands in Fee, reserving a Rent, this is a Rent-seck in a Subject, because a Tenure cannot be created at this Day, and every Fee-farm Rent, when granted by the King, becomes Seck, and therefore not to be extended.

3. It must be admitted, that by a Devise of all his Lands those Copyholds which have been surrendered to the Use of the Will, shall pass to the Trustees, and so it will by the Words, All his real and personal Estate, but there is no Manner of Trust declared, either in the Will or Codicil of his Copyhold Lands; the only Words in the Will, by which any Trust is declared, are, as for and concerning my Freehold and Leasehold Estates, the same shall be to such Trusts, &c. which Words Freehold and Leasehold are exclusive of the Copyhold; so that he having declared no Manner of Trust of his Copyhold Estates, the Trust thereof must result to the Benefit of the Heir at Law.

† 29 Car. 2. cap. 3. §. All Declarations or Creations of Trust shall be manifested by some Writing signed by the Party, or by his Last Will in Writing, or else shall be void.

'Tis true, by the † Statute of Frauds, all Trusts not manifestly shewn by some Writing are made void; but this must be intended of an express Declaration of Trust, and not of any implied or resulting Trust; and this appears by another Paragraph of the same Statute, where the Testator's Intent is to be no farther admitted than 'tis expressed in the aforesaid Limitation of a Trust to a Stranger; therefore if his Intent is doubtful, it shall be construed for the Benefit of the Heir, because all the Trust not disposed must result to such Heir; so that if the Court should be of Opinion, that the Will is not revoked by the Codicil, this Copyhold must descend.

But admitting no Trust is declared of the Copyholds, it can be no Imputation upon the Character of the Testator to

say he made a Will, and did not appoint what Trust his Trustees should have in the Lands he devised; for as great a Man as he was in the Law, another as great as he hath made very strange Bequests in his Will, and that was Serjeant Maynard; and probably it might be the Design of those great Men, to exercise the Wits of those of their own Profession; it was clear, that this was intended by the Serjeant, for after some very unusual Dispositions in his Will, he takes Notice that some Men might admire at it, but that he did not care, Valet quantum valere potest.

Econtra for the Defendant.

On the other Side it was argued for the Defendant, that the principal Point in this Case was the First; and that is, Whether the Codicil was a Revocation of his Will, and his Counsel insisted, that it was not, for it was no more than an Appointment and Substitution of other Trustees in the Room of those whom he had appointed before by his Will; there are no express Words to revoke it, and a Revocation shall be no more intended than the Disinheriting an Heir, for that must be by express Words, and shall never be intended.

Now, according to such Construction which is contended for on the other Side, this Codicil would revoke it self; for by the first Part of it he confirmed the Devise to his first Trustees, and afterwards revokes the Trust to Two of them, which is very inconsistent; but 'tis a more natural Construction, that he revoked their Estate in the Trust, and appointed Two other Trustees to the same Trusts, as before by his Will.

But by the whole Course of the Will it doth not appear, that the Testator intended any Part of his Estate should descend on his Heir at Law; therefore the Will is not revoked by the Codicil; if it should, then the Annuity of 200l. per Annum given to his Sister and Heir at Law, is revoked, and so is the 6000l. given to his Niece, because it was to issue out of the Lands; but neither of them are revoked; and those specifick Legacies are sufficient to exclude them from any Right they may have to the personal Estate of the Testator; like the Case of Bethell *v.* Bethell, lately at the Rolls, where a Man devised one Shilling to his Heir at Law; this was adjudged an absolute Exclusion from any Right he might claim to the Testator's Estate.

It was insisted on by the Bill, and argued for the Plaintiff, that the Manuscripts should descend on the Heir at Law as Heir-looms, but it cannot be presumed that the Testator did devise them to his Trustees to be sold, and the Money to be laid out in a Purchase, &c. for they are not in their Na-

ture a perſonal Eſtate for any ſuch Purpoſe, and the Heir at Law has no Pretence to have them as Heir-looms, for thoſe
* 1 Inſt. 18. are by * Cuſtom, but there can be no Title by Cuſtom to theſe Manuſcripts, becauſe the Teſtator gave them a Being, for they had none before his Time.

(2.) As to the ſecond Point, Whether the Lands which the Teſtator had articled to purchaſe, and the Fee-farm Rents ſhall paſs by the Deviſe of his Lands in the Codicil; it was argued for the Defendant, that they would paſs.

And firſt as to the Lands which he had articled to purchaſe, thoſe Lands muſt be either a real or perſonal Eſtate; it will be abſurd to ſay they are neither; and if they are either, then there are ſufficient Words in the Codicil to paſs them; for the Teſtator takes Notice therein, that he had purchaſed Lands ſince the Making his Will, which Word Lands ſhall extend as well to thoſe for which he had articled, as to others which were actually conveyed to him, and ſhall paſs by a Deviſe of his Lands, as in ſome Caſes by a Deviſe of all his free Lands a Portion of Tithes was adjudged to paſs; ſo in the principal Caſe, the Word Lands ſhall extend to all Eſtates whatſoever; therefore the Rents which he had purchaſed ſince the Making his Will ſhall paſs by the Deviſe of his Lands; beſides the Lands for which he had contracted did not all reſt in Articles, for great Part of the Purchaſe-Money was paid; but the Heir can have no Right to ſuch Lands, if 'tis not a Realty; and if 'tis a real Eſtate, then it may deſcend; but whatever is deſcendible is deviſable, and here 'tis deviſed by the Words Real Eſtate; and tho' the Time of conveying thoſe Lands was not come, yet that will make no Alteration of the Caſe; for the Vendor is from the Time of the Contract deemed a Truſtee for the Purchaſer.

And as to the Fee-farm Rents they ſhall be compriſed in a Deviſe of his Lands, eſpecially thoſe Rents of that Nature which iſſued out of his own Lands; for the intervening Eſtate made to the Wife of the Teſtator for Life, was by a Deviſe of a Rent-charge to her of 1000 l. per Annum for her Life; and by her Acceptance thereof thoſe Rents were merged in the Reverſion, and then by a Deviſe of all his Lands the Rents will paſs.

1. Objection. 3. As to the Teſtator's Copyhold Eſtate, the Objection is, that he having declared a Truſt concerning his Freehold and Leaſehold, and none of his Copyholds, for they are not ſo much as mentioned, Whether a Truſt thereof ſhall reſult to

the Heir at Law; and it was argued, that it should not, because there are sufficient Words by which they will pass, and those are by a Devise of all his real Estate; besides, the Testator never had the legal Estate in those Copyholds, but it was others in Trust for him, which Trust he hath devised, and the Codicil is a Republication of the Will. Answer.

Now there are Authorities in Point to prove, that Copyholds will pass by a Devise of his real Estate; as where a Contract was made for the Purchase of Lands, some of which were Copyholds, it was adjudged, that by a Devise of his real Estate, those Copyholds would pass in Equity, and this was the Case of Woodier *versus* Greenhill.

And so it was held in the Case of * Davy *versus* Beardsham, that Copyhold Lands would pass by the Devise of his Lands, if the Devisee claimed them in Time.

* The Testator had agreed for the Purchase of a Copyhold, and pursuant to that Agreement, a Surrender was made out of Court to his Use; then he devised *all his Lands* to *R. B. &c.* and died before Admittance; it was decreed, that the Copyhold Lands shall pass, because the Testator had a Title in Equity to recover them, and the Vendor stood seised for him till a legal Conveyance could be made. 2 *Chanc. Rep.* 39.

2 Obj. There was another Objection made in the Behalf of the Plaintiff as to that Clause in the Codidil, where the Testator directed, that what he had devised to his Sister in the Will should be in lieu of all Demands she might have out of his Estate, that this Clause might be satisfied by intending such Demands as she may have in her own Right.

Answ. But in Answer to this Objection, 'tis absurd to say a Thing, shall be intended when tis plainly expressed; and here the Words are in lieu of all Demands; neither doth the Plaintiff pretend to shew any particular Demands she had to the Estate, which she ought to have done (if she had any) as an Inducement to what is thus objected in her Behalf. Answer.

Another Objection was, that the Testator could not design to seclude his Sister from having any Share of his Estate by those Words in the Cordicil, where he takes Notice that the Devise of her Annuity was upon Condition she should release all her Right to his Estate, because she being a Feme Covert, he very well knew that her Release would not bar her. Objection.

In Answer to this Objection, the Word Release in this Place cannot be otherwise intended than an effectual Release to bar her which must be by Fine, and no other Release. Answer.

The Teſtator's Widow being made a Party to the Bill, ſhe by her Anſwer, and now by her Counſel inſiſted, that ſhe might have ſome Remedy for the Rent-charge of 1000 l. per ann. given to her for Life, either by Diſtreſs or otherwiſe, for ſhe could have none by the Diſpoſition in the Will; and that ſhe might have a Decree for Payment and Satisfaction thereof, and of the Arrears, and that a Deduction of the parliamentary Taxes might be apportioned to this Rent-charge, in Proportion to the Rents of the Lands out of which it iſſues; for that this being a Rent-charge out of all the Teſtator's Lands, it would be in great Meaſure ſwallowed if it ſhould pay more Taxes than ſo much, iſſuing out of Lands of the Value of 1000 l. per ann.

Then her Counſel inſiſted, that ſhe might be quieted in the Poſſeſſion of the Lands which the Teſtator had left her for Life; and that ſhe might have the Legacy of 200 l. left to her by her Father's Will, with Intereſt to be laid out in what ſhe thought fit, as a Remembrance of him; this being a ſeparate Legacy, and received by her Husband the Teſtator.

Objection. But as to this 200 l. it was objected, that the Teſtator having received it many Years paſt, and tho' for his own Uſe and Benefit; yet he ſhall not be taken as a Debtor, becauſe he had deviſed his Plate, Jewels, and a Legacy of 500 l. to her, beſides his Coach and Horſes; and therefore it ſhall be preſumed ſhe was paid; for according to the ancient Rule Debitor non præſumitur donare, ſo that her long Acquieſcence ſhews her Conſent; and if no Proof could be made, that it was laid (as it really was in a Piece of Plate) there is no Colour for Intereſt to be paid for it, becauſe the Property of that Plate was in the Teſtator whilſt he lived.

Thereupon Mr. Vernon the Defendant conſented to pay the 200 l. but without Intereſt.

Then it was inſiſted for the Widow to have the Manuſcripts as Part of the Teſtator's Houſhold Goods, which were deviſed to her; for tho' the perſonal Eſtate is deviſed to Truſtees to be ſold to purchaſe Lands, yet theſe Manuſcripts are no Part of the perſonal Eſtate, for they are not Aſſets to pay Creditors; therefore ſhall not go over to the Truſtees, and they cannot be Heir-looms for the Reaſon before-mentioned.

But the Widow and the other Defendant Bowater Vernon agreed in Court to have them publiſhed between them, without any Profit to themſelves.

Upon the whole Matter it was concluded for the Defendant, that if this Will should have such a Construction as was contended for by the Plaintiff, then the Testator (notwithstanding all the Pains he had taken to settle his Estate) died Intestate, and all his Trouble was in Vain, which is inconsistent with his Character, who was an Ornament in this Court where he attended, and who acted in all Things with the utmost Accuracy and Exactness.

But he acted in this as he did in all other Cases, and made so good a Will, that even artificial Reasoning is hardly able to raise the least Colour of Doubt about it; so that 'tis a little surprising it should bear any Manner of Contest in a Court of Justice and Equity.

Lastly, It hath been said, that the Heir at Law shall not be disinherited without plain and express Words for that Purpose, but this Saying is too general; 'tis true, if the Words are doubtful, the Heir shall be favoured; but if a Man devises his Lands to one, and in the same Will devises the same Lands to another, they are Joint-tenants, which shews that the Will is to be construed as one entire Clause, and not as different Clauses, and by this Means Contradictions will be avoided in the Construction thereof.

The principal Question in this Case is, Whether the Codicil revoked the Will, and shall be taken as a Course of different Words and Phrases, or as one entire Scheme consummate by the Sealing; and as to that Matter it was held to be the best Way to construe one Part thereof with the other, as one entire Scheme, and which was thought on and considered by the Testator at one and the same Time. Curia.

'Tis absurd to say, that the Revocation in the Codicil of an immaterial Circumstance in the Will, shall revoke the whole Will, for 'tis no more than a Revocation of Part of his Will, by which he had appointed two Persons to be Trustees, and appointing two other in their Room, 'tis as if a Person should set forth in a Codicil, that T. S. whom he had appointed to be his Executor, should not be his Executor; this could never be taken as a Revocation of the Dispositions in his Will.

Now here the Testator by his Codicil appointed two others to be Trustees, and he devised to them accordingly, this must be intended as Joint-tenants of the Trust with those already named in the Will; for the Words other Trustees imply some not before named.

As

As to the Lands for which the Teſtator had contracted, the Owners thereof continue Truſtees for the Teſtator till Conveyances are executed, and he might compel them to convey accordingly; and therefore they ſhall paſs by this Deviſe, tho' he had bought other Lands which were actually conveyed to him, and this was never made a Queſtion in this Court before; and as for the Objection, that what reſts in Articles was neither Lands or Money, this is of no manner of Weight; and therefore it deſerves no Anſwer.

As for the Fee-Farm Rents, a Deviſe of Lands is ſufficient to paſs ſuch Rents, or any other Right out of Lands; and therefore where there is ſuch a Deviſe (as in this Caſe) they ſhall not deſcend to the Heir, eſpecially ſince it appears on the Face of this Will, that the Teſtator had deviſed Two hundred Pounds per ann. to the Heir during Life; and then in the Codicil he takes Notice that his Heir had a ſufficient Proviſion made for her, and ſays that it ſhall be all which ſhe ſhall have, and that on Condition ſhe ſhould releaſe all farther Demands out of his Eſtate both real and perſonal; and this Codicil is a good Republication of his Will.

Now as to Republications there is ſome Difference between real Eſtates, which will not paſs without it, and the Conſtruction of a Deviſe of perſonal Eſtates, to make them paſs without it, which Conſtruction is on the * Statute of Wills, which introduces a new Method of conveying Eſtates, (viz.) That any Perſon having Lands may diſpoſe thereof by Will, and this is founded on the Reaſon of the Common Law, that a Man cannot give what he hath not, as the Heir in Tail cannot grant or releaſe to diſcontinue the Eſtate-Tail: Now, admitting that Rents will paſs by a Deviſe of Lands, yet the Teſtator had not thoſe Lands to deviſe, becauſe the Time of conveying them was not come; 'tis true, this Objection was made, but 'tis of no Weight, becauſe as hath been obſerved already, the Vendors are Truſtees for the Purchaſer till a Conveyance could be made.

* 32 H. 8. cap. 1. 34 & 35 H. 8. cap. 5.

Beſides, a Man's Mind may change when he grows rich, and ſince the Statute of Frauds, a Republication muſt be in Writing.

As to the Copyhold Eſtate, tho' the Teſtator by his Will hath declared only a Truſt of his Freehold and Leaſhold Eſtate, ſo that no Truſt is raiſed by the Will; yet by the Codicil he ſhews plainly, that it was his Intention to paſs a Truſt in them, or to paſs them in Truſt.

As to the Releaſe, 'tis true, 'tis no Conveyance, if nothing paſſed by the Will, nor as this Caſe ſtands, is it any Conveyance to bar the Heir at Law of any Demand to the Teſtator's Eſtate, ſhe being a Feme Covert; but he having declared in the Codicil, that ſhe ſhall have her Annuity on Condition ſhe releaſes, &c. this muſt be intended a Releaſe by Fine, ſo that it may be effectual, otherwiſe ſhe ſhall quit her Annuity.

And this Will, as to the perſonal Eſtate, is good and perfect; therefore it was decreed, that the original Bill ſhould be diſmiſſed with Coſts, but the Defendant forgave the Coſts.

And as to that Part of this Cauſe which related to the Widow of the Teſtator, eſpecially as to the 200 l. which was deviſed to her by her Father, to be laid out in ſomething in Memory of him; it ought to be paid out of the perſonal Eſtate of the Teſtator, it being received by him, and for his own Benefit, and the rather, becauſe he was Executor to her Father; and 'tis a Misbehaviour in him not to perform his Will in every Reſpect, but it ſhall carry no Intereſt, becauſe it was to be laid out in ſomething for his Remembrance, which would have been no Benefit to her Husband, the Teſtator, if laid out in his Life-time, becauſe it was not for her ſeparate Uſe; but was to be laid on a ſpecial Truſt, and to a particular Purpoſe. Money deviſed to be laid out on a ſpecial Truſt carries no Intereſt.

And as for the Reſt of the Widow's Demands, the Defendant is ready to ſatisfy her as deſired.

Affirmed in the Houſe of Lords.

DE

DE
Term. Sanct. Hill.

10 Georgii. In Cancellaria.

Hobſon *verſus* Staneer.

Marriage Settlement not ſet aſide, there being no Fraud proved or Incapacity of the Husband.

A Bill was exhibited by the Plaintiff to be relieved againſt a Bond obtained by the Defendant, and (as ſuggeſted) without any Manner of Conſideration; and to have another Bond of 80 l. conditioned to pay 40 l. to be delivered up to the Plaintiff, the Money being paid, and likewiſe to be relieved againſt a Settlement obtained from him by Fraud, without Conſideration, he being a weak Man.

The Caſe was, that the Plaintiff married the Daughter of the Defendant, who was his firſt Wife, upon which Marriage the Defendant procured a Settlement from him by Fraud, which was by ſettling Part of his Eſtate to the Uſe of himſelf and his ſaid Wife, for Life, Remainder to Truſtees to preſerve contingent Remainders, Remainder to the Uſe of Joſhua Staneer, and his Heirs, who was the eldeſt Son of the Defendant, and Brother to the Plaintiff's Wife, and of other Part of his Eſtate to Truſtees for 200 Years, to pay any Money the Plaintiff ſhould charge it withal, by Way of Legacies, or otherwiſe, Remainder to another Brother of the Plaintiff's Wife, and to his Heirs for ever.

But the Defendant, his Father, took Care to have a Grant from him of that Power which he had to charge the Eſtate; and his Mother-in-Law procured another Grant from him of 100 l. to be paid to her after the Death of his Wife, which was recited to be in Conſideration of the Love and Af-

fection he had for his Wife, who was her Daughter; and they obtained another Bond of him of 80l. conditioned to pay 40l. without any Manner of Consideration; therefore he insisted, that this Settlement and both the Bonds ought to be set aside; and a second Settlement which he made on his now Wife, upon his second Marriage, and in Consideration of her Portion, might be established and made good.

The Defendant answered, that the Plaintiff having married his Daughter, without his Privity or Consent, he was at first very much displeased, but afterwards was reconciled, and took him and his Wife into his House, and paid some of his (the Plaintiff's) Debts, and had done other Services and Kindnesses for him and his Wife, so that he (the Plaintiff) was indebted to the Defendant in the Sum of 100l. and more; and that in Consideration thereof, and of the Love and Affection which he did bear to his Wife (who was now dead) he made the said Settlement, which he insisted on to be good, and not to be set aside.

The single Question upon the Proofs was, Whether this Settlement shall be set aside, either for Want of Capacity in the Plaintiff, or for that it was a voluntary Settlement.

And as to that it was argued for the Defendant, that the Witnesses for the Plaintiff had not shewn one single Instance of his Weakness, but generally, that he was a weak Man; when the Witnesses produced by the Defendant prove, that he was a Person sufficient to manage his own Business and Estate; and certainly 'tis not necessary, that every Man who makes a Settlement should be an ingenious or a learned Man, for 'tis sufficient if he is of an ordinary Capacity; therefore this Settlement ought not to be set aside for any Incapacity in the Plaintiff.

Neither ought it to be set aside as a voluntary Settlement to make Room for another upon the Plaintiff's second Marriage, because the second Settlement was obtained upon no better Consideration than the First, which was had without any Manner of Fraud or Circumvention; and so far from it, that it was proved the Plaintiff always intended, if he had no Issue, that his Estate should go to the Relations of his Wife; and that such his Intent continued even after the Death of his Wife.

But if the Court should be of Opinion, that this is a voluntary Settlement, yet the Bill ought to be dismissed for Want of proper Parties, because Robert Hobson (the Plaintiff's Father) who had the legal Estate by the last Settlement, is not made a Party; besides, the Plaintiff shall not have

any Remedy to set aside the First, and to set up the last Settlement, because he hath the same Estate in both; therefore he can have no Pretence to complain in a Court of Equity for Relief against one Settlement in Favour of another; such an Application as this ought to be made by him who is aggrieved, and who hath an Estate by one Settlement and none by the other.

Therefore it was insisted, that the first Settlement was made on a good Consideration, for what can be better than Marriage? And the Remainders limited on the same Consideration are good.

As for the Bond of 80 l. the Defendant insists, that he paid the Money for the Plaintiff's Use at two Payments, &c.

Contra for the Plaintiff.

On the other Side it was argued, that this was a very extravagant Settlement, in the first Place, because there was no Manner of Provision for the Issue of that Marriage; and tho' there was an Estate limited to Trustees to preserve contingent Remainders, yet there are no Remainders in the Settlement; but the Inheritance of all his (the Plaintiff's) Lands is settled on Joshua Staneer, his Wife's Brother; and in Consideration of Love to his Wife; for after the Limitation to him (the Plaintiff) and his Wife for Life, the Remainder in Fee of Part of the Estate is immedately limited to one of her Brothers; and the Fee of the other Part of the Estate is limited to another of her Brothers, with an intermediate Term of Years to Trustees, which the Plaintiff might charge; but Care was taken to have a Grant of that Power which the Plaintiff had to charge the Lands from the Plaintiff to that Brother, so that after all Events he might be in as good a Condition as his elder Brother.

Besides, this Estate being no more than 50 l. per Annum, and the Plaintiff but Tenant for Life, there are other Incumbrances set up by the Defendant, (viz.) A Grant of 100 l. to the Defendant's Wife at 5 l. per Cent. during her Life, and the Bond of 80 l. which is impossible for him to pay, having only an Estate for Life in such a small Estate; and this shews an apparent Fraud on the Face of the Deed it self; and by this Means the Defendant will always have the Plaintiff in his Power to get any other Writing from him to charge his Estate.

As to the Objection, that this second Settlement was made upon no better a Consideration than the First, the Fact is quite otherwise, for it was made not only in Consideration of Marriage, but of 100 l. which the Plaintiff actually received as a Marriage-Portion with his Wife.

But upon reading the Settlement, it appeared to be thus, ſſ. The Eſtate was limited to Robert Hobſon the Father of the Plaintiff, his Heirs and Aſſigns, during the Lives of the Plaintiff and his Wife, in Truſt that he might employ the Profits for the Maintenance of the ſaid Plaintiff, and his Wife during their Lives, with Remainders to the Iſſue of that Marriage with other Remainders over, ſo that the Plaintiff had no Eſtate by this ſecond Settlement.

The Plaintiff hath no Reaſon to complain, becauſe it appears he is in a better Condition by the firſt Settlement, than by the laſt, for he hath an Eſtate for Life by the firſt, and none by the laſt. Curia.

And there being no Fraud proved in obtaining the firſt Settlement, nor any Manner of Proof of the Plaintiff's Incapacity, there can be no Reaſon to ſet aſide the firſt Settlement.

But Robert Hobſon the Plaintiff's Father, who had the legal Eſtate by the ſecond Settlement, not being made a Party to the Bill, the Plaintiff could have no Decree, but had Leave to amend his Bill, &c.

Evans *verſus* Hoskins *and the City of* Glouceſter.

THE Caſe, ſſ. The Lady Joan Cook by License from King Henry 8. granted the Lands in Queſtion to the Mayor and Burgeſſes of Glouceſter in Truſt, that whenever the Leaſe made by her to one Partridge and Anne his Wife ſhould be determined, that they would make a new Leaſe to them, or to the Heirs of the ſaid Anne at any Time on Requeſt, on Payment of twenty Marks, and under the yearly Rent of twenty Marks for the Space of thirty-one Years, and with ſuch Clauſes and Conditions as in the old Leaſe.

An Aſſignment of an Intereſt in a Leaſe of Lands of the Value of 200 *l. per ann.* in Conſideration of 20 *l.* paid, and upon miſinforming the Plaintiff, was ſet aſide as obtained by Fraud.

And that upon the Expiration of ſuch Leaſe of 31 Years, the Defendants, the Mayor and Burgeſſes of Glouceſter ſhould at any Time on the Requeſt of the Heirs of the ſaid Anne make a new Leaſe to them in manner as aforeſaid.

Now the Plaintiff Evans, and one Holeman Hoskins, who was the Father of the Defendant Hoskins were Coheirs of the ſaid Anne Partridge, and he the ſaid Holeman Hoskins, Anno 1712. got an Aſſignment from the ſaid Evans of his Right without any manner of Conſideration; therefore this Bill was brought againſt the Defendant Hoskins, the Son of the ſaid Holeman Hoskins, to ſet aſide the ſaid Aſſignment as obtained by Fraud and Impoſition on the Plaintiff Evans, by

misinforming him of the State of his Right, and against the other Defendants, the Mayor, &c. to have a Lease made to the Plaintiff Evans, and to the Defendant Hoskins, as Coheirs to the said Anne Partridge, and according to the Covenants in the original Lease granted by the Lady Cook to the Mayor, &c.

The Defendants by their Answer acknowledge, that the Plaintiff and the Defendant Hoskins are Coheirs to the said Anne Partridge, and that the Lady Cook made such a Grant to the Mayor, *&c.* of Gloucester, as in the Bill is set forth, and that Leases have since been made of those Lands, pursuant to the Covenants in the original Lease.

But that Anno 1712. The Plaintiff Evans, in Consideration of 80l. paid to him by Holeman Hoskins, (the Defendant Hoskins Father) assigned all his Right in the Lease to him the said Holeman Hoskins; and by another Deed covenanted that the said Holeman Hoskins might make Use of his (the Plaintiff's) Name in taking a new Lease of the City, &c. and that his Name might be put in the said new Lease, in Trust for the Defendant Hoskins; and that on producing the said Deed, the City made a new Lease to the said Holeman Hoskins, without naming the Plaintiff, but denies any Fraud in obtaining the said Lease.

The Mayor and Burgesses likewise own the Pedegree, the Grant, and the Trust, as set forth in the Bill; and that on shewing them an Assignment, made by the Plaintiff Evans, of all his Right, they made a new Lease to the said Holeman Hoskins, according to the Covenants in the original Lease.

For the Plaintiff. This being the Case, those who argued for the Plaintiff, insisted that Leases had been made from Time to Time according to the Covenants and Clauses in the original Lease, and that the last Lease granted to Holeman Hoskins was in the Year 1690. and that the said Holeman in the Year 1712. made Application to the Plaintiff Evans, who was a Stranger to this Covenant, and informed him, that the City insisted on 250l. Fine, and on a considerable Advancement of the Rent.

Whereupon the Plaintiff Evans being thus misinformed, and not knowing but the Lease in Being would soon expire, executed this Assignment in Consideration of twenty Pounds to him paid by the said Holeman Hoskins, and no more.

'Tis true, the Defendant Hoskins who is Executor of the said Holeman Hoskins, pretends that this Assignment was made in Consideration of 80 l. paid to the Plaintiff Evans,

which he denies; but admitting it was so, 'tis a very small Consideration for the Purchase of such a Lease, the Lands being worth above 200 l. per ann. besides, at the Time of this Assignment, there were twelve Years of the old Lease unexpired; so that a Fraud appears upon the very Face of the Deed it self.

Therefore it was insisted, that the said Assigment should be set aside, and a new Lease decreed to the Plaintiff Evans; and that the Defendant as Executor to Holeman Hoskins may account to the Plaintiff for the Profits of the Lease received by his Father Holeman Hoskins in his Life-Time, and by him the Defendant since his Father's Death.

On reading the Proofs, it appeared, that there was no more than Twenty Pounds paid to the Plaintiff as a Consideration of his Assigning his Right in the Lease to the said Holeman Hoskins; and that the Benefit thereof was worth more to him than Two Hundred per ann. and that twelve Years of the old Lease were unexpired at the Time when he (the Plaintiff) executed this Assignment; and it appeared by a Letter which was proved to be written by the said Holeman Hoskins, purporting that he and the Plaintiff were to pay Two hundred and fifty Pounds to the City, for a Fine on renewing the Lease when they were to pay only twenty Marks, and no more.

And all that the Defendant proved was, that the Lands were not of so great a Value at the Time of the Assignment as they were now, and that the City insisted on 150 l. for a Fine.

Which is very true, but the Reason was, because Holeman Hoskins would have a Lease made to him exclusive of the Plaintiff Evans.

Whereupon the Court decreed, that this Assignment should be set aside, and a new Lease to be made to the Plaintiff, and to the Heirs of Holeman Hoskins according to the Covenant in the original Indenture made between the Lady Joan Cook, and the City of Glocester. Curia.

And that the Defendant (the Executor of Holeman Hoskins) shall account for a Moiety of the Profits during the said Holeman's Life, and since his Death, and shall pay the Costs of this Suit.

Ho-

Hoſier *verſus* Read.

Where an Agreement by Parol, but confeſſed in the Anſwer, ſhall be executed, tho' not in Writing.

THE Plaintiff exhibited this Bill to have the Defendant execute ſuch a Leaſe as the Court ſhould direct.

The Caſe upon the Pleadings was thus, (viz.) There was an Agreement in Writing executed between the Plaintiff and the Defendant, by which the Defendant was obliged to take a Leaſe of a Farm of the Plaintiff for nine Years, at the yearly Rent of 140l. and at the Time of executing the ſaid Agreement, the Defendant averred, that he had a Leaſe of the great Tithes of the Pariſh of Calverton, and promiſed to manure this Farm with the Straw of the ſaid Tithes when made into Dung; that by Virtue of this Agreement, the Defendant entered and plowed ſome Paſture Ground, and grubbed up ſome Buſhes contrary to the ſaid Agreement; for which Plowing and Grubbing, the Plaintiff demands Satisfaction, and that the Defendant might execute a Leaſe according to the ſaid Agreement.

That there was a Meeting between them to execute a Leaſe, but then the Defendant inſiſted upon ſome extraordinary Conditions not in the written Agreement; and that what chiefly induced the Plaintiff to enter into this Agreement, was the Promiſe of the Defendant to manure the Lands with the Straw as aforeſaid.

* *Nota*; this Agreement in Writing was loſt.

The Defendant by his Anſwer confeſſed, that he agreed to take a Leaſe of this Farm, by which * Agreement the Plaintiff was to repair the Houſe, and Outhouſes, and to build a new Dairy Houſe, and to ſink a Well; and that the Defendant was to have Liberty to plough up ſome Cloſes, and to grub Buſhes in others, which was in Conſideration of 10l. per ann. Advance of Rent; and that according to this Agreement, he is willing and ready to execute a Leaſe, and ſays that the written Agreement on which the Plaintiff inſiſts is no more than a Memorandum drawn by an Attorney, and that the Defendant had agreed to take a Leaſe of the Farm for ſuch a Term, and under ſuch a Rent, that the Plaintiff agreed to let the Defendant have the Poſſeſſion, for that Lady-Day was near at Hand, and until he (the Plaintiff) ſhould be ſatisfied that a Clauſe in the Leaſe, on which the Defendant inſiſted, was uſual to be inſerted in Leaſes there, which Clauſe was, (viz.) The Defendant was to covenant to leave the Premiſes in good Repair, the Accidents by Fire and Tempeſt only excepted, and unleſs

that Clauſe was inſerted in the Leaſe, the Defendant refuſed to ſign it.

But the Plaintiff inſiſting to have a Leaſe executed according to the Agreement in Writing; and the Defendant refuſing it for the Reaſon before-mentioned, the Plaintiff exhibited his Bill to inforce the Execution of ſuch Leaſe.

Thereupon the Defendant exhibited a Croſs-Bill, in which he ſet forth the Agreement at large, as before in his Anſwer to the original Bill, and inſiſted, that the Plaintiff might execute a Leaſe according to that Agreement, which he was ready to execute on his Part.

To which Croſs-Bill the Plaintiff made Anſwer, by which he confeſſed, that by the firſt Agreement he was to put the Houſes in Repair, and to make a new Dairy, and to ſink a Well; but that all this was to be done upon a Suppoſition that the now Plaintiff had a Leaſe of the ſaid Tithes, (as he affirmed) and would manure the Farm with the Straw thereof, but denies that the Plaintiff had any Leave to grub up Buſhes in Conſideration of Advance of Rent, for that 10 l. per Annum Advance is no Manner of Conſideration, the Farm being very well worth 140 l. and ſo much the former Tenant paid; but inſiſts on a Leaſe in Purſuance of the written Agreement; and that there was no Clauſe therein by which Liberty was given to grub any Buſhes in Conſideration of Advance of Rent.

There were two Queſtions upon theſe Bills, Anſwers and Proofs; the Firſt was, if the Plaintiff in the original Bill ſhall have a Leaſe according to the written Agreement, or Memorandum in Writing.

2. If he ſhall be obliged to execute a Leaſe to the Defendant, according to the Agreement ſet forth in the Anſwer to the Croſs-Bill, which was not in Writing, that being loſt.

As to this Matter, the Caſe is thus: One Thompſon, an Attorney, drew ſome Heads of an Agreement between the Plaintiff and the Defendant, which Heads were now loſt; but this Attorney, who was choſen by both Parties, made Oath, that the Purport of them was according * to the Agreement ſet forth in the Anſwers, both to the Original and Croſs-Bills; and that in the Leaſe of the former Tenant there was a Clauſe to repair, but Fire and Tempeſt were excepted, and that 'tis an uſual Exception in Leaſes there.

* *I.* To put the Houſes in Repair, to make a new Dairy-houſe, to ſink a Well, to have Liberty to plough ſome Cloſes, to grub Buſhes in other Cloſes, and that Fire and Tempeſt ſhould be excepted.

It

It was likewise in Proof, that when the Parties met to execute a Lease, there was no Objection made by the Plaintiff but only to that Exception, and that the written Agreement was no more than a Memorandum, that the Defendant being likely to be out of the Farm he then held, and Lady-Day coming on, it was thought convenient he should have some Place to enter with his Stock till the Plaintiff should be satisfied, whether such a Clause was usual in Leases.

* Mentioned before in the Margin, and which did not appear in Writing, that being lost.

'Tis true, this Memorandum refers to the first Agreement, but the Plaintiff in his Answer to the Cross-Bill confesses, that he agreed to most of the * Clauses, but that it was upon other Considerations, as he would now insinuate.

Jones *versus* Sheriffe.

In the Case of Jones and Sheriffe there were Heads of an intended Lease taken by an Attorney in Writing; but upon Proof that some other Clauses were agreed on between the Parties at the same Time, this Court decreed, that those Clauses should be put into the Lease, notwithstanding the Counsel on the other Side strenuously insisted on the Statute of Frauds.

So in Case of absolute Mortgages (which was the old Way of mortgaging Estates) with a Promise by the Mortgagee to make a Defeasance, which he afterwards denied to make, and insisted, that since the Statute of Frauds, he was not obliged to do, because not in Writing; but on the Hardship of the Case, and on the Fraud, the Court decreed a Defeasance.

Econtra.

On the other Side it was argued, that it would be of dangerous Consequence to admit this Parol and pretended Agreement to be given in Evidence directly against this written Agreement; this is a Thing which could not be done before the Statute of Frauds, much less since that Statute was made.

Besides, this Parol Agreement is inconsistent in its very Nature, it being for Leave to cut Bushes in a Country where fuel is very scarce, and where many young Oaks are preserved by those Bushes whilst growing; and therefore it was insisted to have a Lease executed according to the written Agreement.

Curia.

The Agreement being in Writing, the Court was of Opinion not to make any Decree against it upon a parol Agreement; but the Counsel for the Defendant insisting, that it did not stand on the Foot of a parol Agreement, because it was confessed in the Answer to the Cross Bill; and it being fully proved by the Attorney who drew it, and no Objections

being made to it, but as aforesaid, the Court, upon the Reading the Proof of the second Writing or Memorandum, and finding it referred to the first Agreement, dismissed both the Bills, but without Costs.

Scurry & Ux' *versus* Morse.

THIS was a Bill brought by the Plaintiff and his Wife, who was the Widow of Henry Bodily, to have an Account of the personal Estate of the said Henry, and to be repaid some Costs the Defendant put them unto, by unnecessary Suits at Law.

A Creditor cannot sue one Co-executor alone without the other.

The Bill sets forth, that the Plaintiff Scurry was Executrix of the said Henry Bodily, her first Husband, who likewise constituted the Defendant Morse, and another, as Co-executors in Trust for his Widow, the now Plaintiff, in order to assist her to recover the personal Estate; but that the Defendant Morse now insists to act as Executor alone; and farther, that the Testator, Henry Bodily, her first Husband, sued the Executors of Henry Bodily the Elder, but died before the said Suit was ended; and thereupon this Defendant Morse prosecuted that Suit to an Account before a Master, but then released it; and therefore the Plaintiffs now insist, that the Defendant shall account, or that the Account taken before the Master may be inspected.

The Defendant by his Answer says, that he hath done nothing but as Executor to the Testator Henry Bodily, and in Trust for his Children, and that this Suit ought not to be carried on against him alone, who is but one of the three Co-executors, so that there are not proper Parties before the Court.

It was argued for the Plaintiff, that tho' there were three Co-executors, yet the Plaintiff might release one, and demand an Account against the other of such Part of the Testator's Goods as came to his Hands, which Demand was now made of the Defendant, who was only a Trustee for the Plaintiff.

Curia.

The Court was of Opinion, that the Plaintiffs could not sue as Creditors, one Executor without the other, nor as Residuary Legatee; so the Bill was dismissed for Want of proper Parties.

Dawſon *verſus* Chater.

A Will ſhall not be eſtabliſhed againſt an Heir at Law, without a Trial at Common Law.

AN Eſtate was deviſed to T. P. who exhibited this Bill againſt the Heir at Law, to have the Poſſeſſion thereof according to the Will of the Teſtator.

The Defendant, by his Anſwer, denied the Making any ſuch Will as in the Bill is ſet forth; but that if any ſuch was made, it was obtained by the Plaintiff by Circumvention and Fraud, when the Teſtator was in extremis, and not of a ſufficient Capacity, or diſpoſing Memory.

Curia.

The Court was of Opinion, that it would be to no Purpoſe to proceed in the Hearing this Cauſe, for that it was a poſitive Rule, that where there is any Doubt on the Proofs, a Will ſhall not be eſtabliſhed againſt an Heir without a Trial at Law; therefore if a Decree ſhould be made againſt the Heir, it would be reverſed in the Houſe of Lords for that Reaſon.

And as to this Matter, the Caſe of my Lord Montacue is full in Point, to whom very great Legacies were given, and he was made ſole Executor of the Will, which he proved in Doctors Commons, and received the Legacies; but afterwards exhibited a Bill in this Court as Heir at Law to the Teſtator againſt the Defendants, to whom the Eſtate was deviſed; ſuggeſting that he (the Teſtator) was not Compos mentis at the Time of Making the Will.

And the Lord Cowper, who was then Chancellor, conſidering this Will was conteſted by him who ſwore to the Truth thereof, and profitted under it, decreed againſt him; but the Decree was reverſed in the Houſe of Lords, where it was reſolved, that no Decree againſt an Heir at Law ſhall eſtabliſh a Will without a Trial at Law, if the Heir inſiſts on it, eſpecially where there is any Lands deviſed.

Hack *verſus* Leonard.

Bill to be relieved againſt a Verdict in Ejectment, for not Repairing, &c.

A Bill was brought againſt an Adminiſtrator to have a new Leaſe granted for the Reſidue of the Term granted by the Inteſtate; the Caſe was thus:

ſi. An Ejectment was brought by the Inteſtate, upon a Leaſe for Years made by him to the Leſſee, rendring Rent, with a Clauſe of Re-entry for Non-payment of the Rent, and for Non-performance of the Covenants, which on the

Part of the Leſſee were to be paid and perfoꝛmed, and the Bꝛeach was aſſigned generally foꝛ Non-perfoꝛmance of the Covenants in the Leaſe; thereupon the Agent foꝛ the Leſſee asked the Leſſoꝛ what Rent was due to him, and that it ſhould be paid, who replyed, he would not trouble himſelf about the Rent, but would ſet aſide the Leaſe; and the Defendant being pꝛepared to pꝛove a Tender of the Rent, pleaded Perfoꝛmance generally; upon which they were at Iſſue, and at the Trial, the Defendant offering to pꝛove the Tender, the Plaintiff did not inſiſt upon the Non-payment of Rent, but pꝛoved a Bꝛeach of Covenant for not keeping a Barn well thatched; thereupon the Plaintiff had a Verdict, and the Defendant was turned out of Poſſeſſion, and ſoon afterwards the Plaintiff died Inteſtate; and now this Bill was exhibited againſt his Adminiſtratoꝛ to be relieved againſt the ſaid Verdict, and to have a new Leaſe granted to the Plaintiff foꝛ ſo much of the Term of the firſt Leaſe, which was not expired.

If a Bond had been given foꝛ the Perfoꝛmance of Covenants in this Leaſe, and had been afterwards put in Suit, this Court could not grant any Relief againſt it; but the Loꝛd Chancelloꝛ ſaid he could not appꝛehend what Damage the Adminiſtratoꝛ could ſuſtain, if the Leſſee ſuffered the Buildings to be out of repair, ſo as he kept the main Timber from being rotten, and left all in good repair befoꝛe the End of the Term; therefoꝛe it was referred to a Maſter to ſee what Damage was done (if any) foꝛ Non-perfoꝛmance of Covenants, and at what Time, &c. Curia.

DE

Term. Paſchæ,

10 Georgii. In Cancellaria.

Anonymus.

THE Teſtator had three Daughters, to whom he gave ſpecifick Legacies by his laſt Will and Teſtament; and having deviſed ſeveral other Legacies to particular Perſons named in his ſaid Will, he gave all the Reſidue of his Eſtate to W. R. &c. in Truſt to increaſe his Daughters Portions; the Queſtion was, Whether by this Deviſe they had an Eſtate in Fee in his Lands.

Thoſe who argued, that they had not relied upon a Caſe in 2 Roll. Abr. where the Father deviſed his Eſtate to his Son and Daughter equally to be divided; and it was adjudged an Eſtate for Life only in the Daughter, there being no Words either in that Will or this to paſs the Inheritance.

The Lord Chancellor at the firſt opening this Caſe, did not remember that it was ever adjudged an Inheritance ſhould paſs by the bare Deviſe of all his Eſtate; but that is not the preſent Caſe, for here the Deviſe was of all the Reſidue of his Eſtate, &c. to his three Daughters, to increaſe their Portions, which Words plainly ſhew the Teſtator intended to paſs the Inheritance immediately; otherwiſe they might never get any Thing by it; ſo it was decreed, that the Inheritance did paſs.

Burdett *verſus* Young.

UPON a Bill brought for a Legacy of 1000 l. left to the Plaintiff by his Grandfather, and to have Security for ſome ſpecifick Legacies left to him to be paid after the Death of his Grandmother (the now Defendant) ſetting forth, that the Plaintiff is the Grandſon, and the Defendant is the Widow of Thomas Sutton the Teſtator, who by his Will deviſed 1000 l. to the Plaintiff, and all other his Eſtate, and the Uſe of all his Houſhold Goods to the Defendant, whom he made Executrix, &c.

Deviſe of a Legacy to his Grandchildren, if they arrive to the Age of 21 Years, or marry.

The Defendant inſiſted by her Anſwer, that Thomas Sutton the Teſtator was a Freeman of the City of London, and could diſpoſe a Moiety only of his Eſtate, and no more; and that the other Moiety thereof belonged to her (this Defendant) by Virtue of the Cuſtom of London, and likewiſe her Paraphernalia; and ſhe inſiſts likewiſe that the Teſtator having deviſed to the Plaintiff ſeveral ſpecifick Legacies to be paid after her Death, and having deviſed his perſonal Eſtate to her, that this 1000 l. ought not to be paid during her Life, nor any Security to be given for the Houſhold Goods.

At the Hearing this Cauſe, there was no other Proof to ſhew, that Thomas Sutton the Teſtator, was a Freeman of London, but that one Thomas Sutton was admitted to his Freedom in ſuch a Year, but it did not appear to be the ſame Perſon.

Then the different Penning this Will as to the ſpecifick Legacies, and this 1000 l. ſheweth, that the Teſtator intended the 1000 l. ſhould be paid immediately, and not wait till the Death of the Defendant; the Words of the Will were,

ſſ. Item, I give all my perſonal Eſtate to my Wife, and to both my Grandchildren a Thouſand Pounds a-piece, if they arrive at the Age of Twenty-one Years, or Marriage, which laſt Clauſe controls the firſt Deviſe of the perſonal Eſtate to the Defendant, and makes the ſubſequent Diſpoſition of the 1000 l. a-piece to his Grandchildren good; ſo that theſe Legacies ought to be paid immediately after the Contingency happened, and likewiſe Security ought to be given immediately for thoſe ſpecifick Legacies which are to be paid after the Defendant's Death.

The Queſtion is, Whether the Teſtator's Eſtate is deviſed to the Defendant abſolutely, or ſo much thereof, during her

Curia.

her Life, which was not before diſpoſed; and the Court was of Opinion, that it muſt be ſo much thereof as was not diſpoſed by the Will; for otherwiſe this Will would be inconſiſtent, for he deviſed 1000 l. to one of his Grandchildren who was his Heir at Law, and who would have been intitled to his whole Eſtate, after the Death of his Wife; therefore a Deviſe of 1000 l. to be paid to him out of the Teſtator's Eſtate, would be impertinent when he was to have the whole Eſtate himſelf; beſides, in this Caſe 'tis expreſly to be paid at the Age of twenty-one Years, or a Day of Marriage; which being now paſt, it was decreed, that the Plaintiff ſhould have this 1000 l. immediately, together with Intereſt, ever ſince it became due; and that the Defendant ſhould give Security, that the ſpecifick Legacies ſhould be paid after her Death.

There was an Appeal from this Decree to the Houſe of Peers at their next Seſſions, where it was confirmed in all Parts, and the Appellant paid Coſts.

Bow *verſus* Smith.

Commiſſioners of Sewers made a wrong Aſſeſſment, and the Plaintiff by their Warrant diſtrained; the Court would not relieve.

THE Commiſſioners of Sewers aſſeſſed all the Lands from ſuch a Place to ſuch a Place in the Level, to raiſe Money to build a new Sluice, and by Warrant directed to the Plaintiff appointed him to collect the Money of the Owners and Occupiers of the ſaid Lands, who by Virtue thereof made ſeveral Diſtreſſes, and levied Money of the Defendant's Tenants, for which he bought ſeveral Actions (againſt the now Plaintiff) in their Names; and the ſaid Aſſeſſment being not ſtrictly legal, becauſe it ſhould be aſſeſſed on every particular Tenant proportionable to the Damage he might ſuſtain; therefore the Warrants and Diſtreſſes were not good, and ſo the Plaintiff could not defend himſelf at Law, but a Verdict paſſed againſt him; and thereupon he exhibited his Bill to ſuperſede thoſe Actions, ſuggeſting this Matter, and that the ſaid Actions were vexatious.

The Defendant inſiſts, that the Commiſſioners had no Power to tax him, for that there was an old Sluice near the Place where the new one was intended to be built, which was ſufficient to ſecure all the Level; and that the new Sluice when built, would be of no manner of Advantage to him, and conſequently he ought not to be contributory to the Charge of building it, and therefore that both he and his Tenants had good Right to bring Actions for the Money extorted from them.

The Lord Chancellor would not help in this Caſe, for if he did, then the Orders of Commiſſioners of Sewers, and of the Seſſions, would be made in this Court; now, here the Aſſeſſment was wrong, and Money was levied by Virtue of ſuch a wrongful Aſſeſſment, which ought to be refunded, and a new Aſſeſſment made; and the right Way of Making it is to aſſeſs the particular Lands, according to the Danger they lie in; and that 'tis not neceſſary to name the Owners or Occupiers of ſuch Lands, for the Commiſſioners may not know them; for if not naming the Owners ſhould make the Aſſeſſment void, there would be an End of all Aſſeſſments by Commiſſioners of Sewers; therefore if that was the Fact, it might be proper for this Court to interpoſe. Curia.

The Lord Coningsby's *Caſe.*

THE Plaintiff exhibited a Bill in the Dutchy Court for ſeveral Lands, &c. reciting ſome Acts of Parliament, and ſetting forth ſeveral Patents and Grants from the Crown, and from thence derived a Title to himſelf of thoſe Lands within the Dutchy. Bill in the Dutchy Court for Lands, the Defendant demurred, becauſe the Plaintiff did not aver, that the Lands were within the Dutchy, which is a circumſcribed Juriſdiction, and the Demurrer held good.

The Defendants demur to the Bill, becauſe the Plaintiff did not expreſly aver the Lands to be within the Dutchy, but only by Inference.

This Demurrer was argued before the Lord Letchmere, Chancellor of the Dutchy Court, and before the Lord Chief Juſtice King, Baron Page, and Mr. Reeves, Aſſiſtants, and they delivered their Opinions ſeriatim, in which they all agreed, that the Dutchy was a circumſcribed Juriſdiction, and that in all ſuch Juriſdictions, the Plaintiff in his Bill or Declaration ought to ſhew, that the Cauſe did ariſe within the Juriſdiction, otherwiſe the Defendant may take Advantage of it by Demurrer.

That in Courts of general Juriſdiction, as the Court of Exchequer or King's Bench, tho' univerſal as to the Right; yet becauſe circumſcribed or limited as to Perſons, ſuch Averments muſt be made; tho' where the Juriſdiction is general, ſuch Allegation is not traverſable, as it is in a circumſcribed Juriſdiction; therefore the Plaintiff ſhould have poſitively averred theſe Lands were within the Dutchy, otherwiſe he cannot maintain this Bill.

Osborn

Osborn *verſus* Lea.

Where a Mortgagee helps to carry on a Fraud, his Mortgage ſhall be ſet aſide.

THIS was a Bill brought by the Plaintiff, who was the Widow of John Osborn, Son of Sir John Osborn, to ſet aſide a Mortgage made to one Weeden, who was Steward to Sir John Osborn, for that her Title was precedent to the Title of the Mortgagee, it being by Articles in Marriage, and in Conſideration of a Portion paid, that the Lands were ſettled on her in Jointure.

The Defendant Lea, by her Anſwer ſaid, that ſhe was only an Aſſignee of the Mortgagee, and did not know that there was any prior Incumbrance, and the other Defendant Weeden ſays, that he did know any Thing of the Plaintiff's Marriage, at, or before the Time of the Taking the Mortgage, which was for 1200 l. and that he had lent the greateſt Part of that Money to John Osborn the Mortgagor.

At the Hearing this Cauſe, it was inſiſted for the Plaintiff, that this Mortgage was fraudulent againſt the Plaintiff.

Firſt, Becauſe 'tis very likely that the Mortgagee, who was a Steward in the Family, muſt know that there was a Treaty of Marriage between John Osborn and the Plaintiff, and that he would not take a Mortgage of the Lands dated after the Articles, by which the ſaid Lands were to be ſettled in Jointure; but admitting the Mortgage was made to him before he knew any Thing concerning the Marriage, or the Articles; yet as ſoon as ever he knew that there was ſuch a Treaty, and that the Articles were intended to be executed, he ought to have given Notice of his Mortgage to the Plaintiff, or to thoſe who were concerned for her in the ſaid Treaty of Marriage; otherwiſe 'tis a meer Fraud, and ſhe ought now to be relieved, like the Caſe of Watts and Treſwick in my Lord Cowper's Time, where the Heir in Tail, knowing his Title, became a Witneſs to a Mortgage; and becauſe he did not diſcover his Title to the Mortgagee, that very Mortgage was eſtabliſhed in this Court; and he was decreed to ſuffer a Common Recovery; ſo in the Caſe of Haws and Potts, where the Brother, who was the Remainder-Man in Tail, joined in the Settlement of a Jointure on his Brother's Wife, he was decreed to confirm the Jointure.

Econtra.

On the other Side it was ſaid, that every Caſe depended on its own Circumſtances, and that the Caſe of Watts and Treſwick was, that the Son ſolicited the Lending the Money

to his Father, and carried the Deed of Settlement to Counſel, and was a Witneſs to the Deed of Mortgage; ſo that he was all this While contriving a Fraud on the Lender; therefore it was a juſt Decree, that the Mortgage ſhould be eſtabliſhed againſt this Fraud, and againſt his Title in Tail.

But in the principal Caſe it appearing, that this Deed of Mortgage was dated 11 April, 1710, and that the Marriage was had in Auguſt following, and Weeden the Mortgagee having made an equivocal Anſwer, that the Deed was dated on or about the 11th of April, and that he had paid the greateſt Part of the Mortgage-Money, when it appeared that he had not paid 400 l. Part of the 1200 l. this gave ſome Occaſion to ſuſpect him; and thereupon the Mortgage-Deed was produced in Court, dated as aforeſaid, (viz.) 11th of April, 1710, and ſome of the Officers of the Stamp-Office attending, they affirmed, that by the Stamp on that Deed, it could not be made in the Year 1710, but in the Year 1711, or after, becauſe that Stamp was not uſed before that Year, (viz.) before the Year 1711: So that there is a ſtrong Preſumption it was antedated on Purpoſe to over-reach the Settlement on the Plaintiff.

Thereupon the Chancellor ordered that Matter to be tried at Law, and ſaid, that if it was found that the Settlement was made before the Mortgage, as it was very probable it would, then the Defendant Lea ſhould have a Remedy over againſt Weeden the Mortgagee.

But as to the other Point, he was of Opinion, that it would be very hard for a Mortgagee to be at the Peril of loſing his Mortgage-Money, if he did not give Notice of his Mortgage to any Perſon whom he knew to treat about the Sale, or any Settlement of the Lands in his Mortgage; and that it very much differs from the Caſe where the Mortgagee himſelf helps to carry on ſuch a Treaty.

DE

Term. Sanct. Mich.

11 Georgii. In Cancellaria.

Smart *verſus* Taylor.

Information againſt a Perſon for Contriving to marry a Woman to an Ideot.

TWO Women being Acceſſary to the Marriage of a third Woman, to one who was an Ideot, and who had 45 l. per Annum, Lands of Inheritance, and being ordered to attend the Court, ſtood in Contempt, and refuſed to appear; and being committed, they now petitioned to be diſcharged; but one Greenwood being the principal Contriver of this Marriage, and the Friends of the Ideot having no Evidence to impeach it in Doctors Commons, nor any Evidence againſt this Greenwood, but the Petitioners; it was inſiſted, that they ſhould not be diſcharged without good Security to give Evidence of this Contrivance,

Which the Court thought reaſonable, and therefore they were ordered to be kept in Cuſtody until they give ſuch Evidence or good Security for that Purpoſe; and it was directed, that the Attorney ſhould cauſe an Information to be filed againſt Greenwood, and that the Priſoners ſhould remain in Cuſtody till they gave Evidence againſt him in like Manner.

Floire *verſus* Sidenham.

THE Plaintiff exhibited his Bill as one of the Coheirs of Sir John St. Barb, and claimed a Moiety of the Eſtate by Virtue of a Settlement made by one Henry St. Barb, the Grandfather of the Plaintiff, and of the now Defendant, who having ſet up a Will made by Sir John, in Favour of the ſaid Defendant; and it being ſuggeſted in this Bill, that the Will (if any) was fraudulently obtained, it was prayed, that the Deeds and Writings concerning the Lands in Queſtion might be brought into Court, and the rather becauſe the Defendant in his Anſwer owns the Settlement as ſet forth in the Bill, and that the Plaintiff is one of the Coheirs of Sir John; but ſays, that John St. Barb, the Father of Sir John, ſuffered a common Recovery of all or the greateſt Part of theſe Lands, and declared the Uſes to Sir John and his Heirs, ſo that he might lawfully deviſe the ſame by his Will.

Where Deeds were ordered to be brought into Court, that the Plaintiff might inſpect them to make out his Title.

And now it was inſiſted for the Plaintiff, that the Court would give him an Opportunity to inſpect the ſaid Deeds and Writings, as was done in the Caſes of the Earls of Suffolk and Ferrers; and this is but a Piece of common Juſtice uſually done by this Court, in Favour of an Heir; nay, it hath been done in the Caſe of a Deviſee who is hæres factus, as particularly in the Caſe of the late Duke of Newcaſtle's Will, and it ought the rather to be done in the principal Caſe; for though the Defendant hath proved this Will as Executor, yet he ſays in his Anſwer, that if it ſhould be ſet aſide, there are other Wills in Being, by which the Eſtate is deviſed to him.

'Tis admitted, that the Plaintiff is one of the Coheirs of Sir John St. Barb, but that he brought his Bill in the Exchequer, ſuggeſting the ſame Matter as by the preſent Bill, and that upon hearing the Cauſe, that Bill was diſmiſſed; and now he hath brought a new Bill in this Court, and the Defendant inſiſts, that if the Plaintiff hath any Right, he ſhould try it at Law, and he farther inſiſts, that Sir John St. Barb was Tenant in Tail general, and that he levied a Fine of the Lands now in Queſtion; ſo that if the common Recovery, and the Deed to lead the Uſes thereof, doth not avoid this Settlement, the Fine will do it effectually; and that the Defendant is willing to ſhew the Plaintiff all the

Econtra.

Settlements of the Family, but not all the Conveyances, Counterparts of Leases, and old Deeds.

Curia. The Right of the Plaintiff at Law cannot be tried without the Deeds, and there can be no Reason why the Plaintiff should contest the Will before he knows whether the Testator had Power to make it, which cannot be known without the Settlement, and the Deed to lead the Uses of the common Recovery; for if the Plaintiff hath any Right, 'tis by Virtue of this Settlement made by his great Grandfather.

And as this Contest is between Coheirs, where one sets up a Will made in his Favour, and insists, that he is not obliged to produce the Settlement until the Will is set aside, certainly that cannot be a Reason for not producing it, because the Plaintiff hath no better a Right to see it then, (viz.) after the Will is set aside, than he hath now; therefore the best Method is to have the Deeds brought before the Court, and that the Plaintiff shall be paid the Costs of this Suit.

Drummond *versus* Sir Matthew Decker.

Whether a Foreigner who married a Subject of *England* attainted of Treason, shall forfeit her Portion to the King.

THE Case, ſs. The Plaintiff Drummond perſuaded the Marchioneſs Venlete to lay out a conſiderable Sum of Money in Bank Annuities, and ſhe, or the Plaintiff by her Order employed the Defendant to purchaſe the ſame, and furniſhed him with 50000 l. for that Purpoſe; accordingly the Defendant purchaſed Annuities to that Value in the Name of the now Plaintiff, but in Truſt for that Lady, and aſſigned Part thereof, (viz.) 10000 l. to her Uſe, who now by her Bill demands the Reſt.

The Defendant Sir Matthew Decker confeſſes the Sum demanded to be due to the Plaintiff, but ſays, he hearing ſhe was married to the late Lord Bullingbrooke, was adviſed not to pay it, without the Decree of this Court to indemnify him.

The Attorney General who was a Party, inſiſted for the King, that if in the Progreſs of this Cauſe any Right ſhould appear to be in the Crown, that ſuch Right might be ſaved, and ſubmits to the Demands, if ſhe gives ſuch Proof as ſhall ſatisfy the Court, that ſhe is not married to any Subject of the King of Great Britain, who is attainted.

Where-

Whereupon her Affidavit was read, which was annexed to the Bill, by which it appeared, that she was not married, and there was no Proof that she was married; but if she was, it was argued, that the Law of England should not be the Measure of the Decree of this Court in such Case, but the Law of another Country; this being a bare Trust for a Foreigner, and the Court hath always a Regard to the Laws of other Nations; as for Instance; of the * Laws of Holland, and of the Laws of the Plantations.

* 1 Chan. *Cases* 232, 145. 2 Vent. 358.

There is no Proof made of the Marriage of this Lady; and therefore there cannot be any Contest between the Parties as to that Matter; if there should, 'tis probable that some difficult Points might arise; for supposing she was married to the Lord Bullingbroke, it would then be a Question of great Importance, whether this Money was forfeited or not by his Attainder; for since all Foreigners are encouraged by Act of Parliament to Place their Money in the publick Funds, it would be very hard that this Money should be forfeited; for then the Consequence would be, that a Lady in France, who hath a separate Property from her Husband in her own personal Estate, would by placing it in the Funds pursuant to an Act of Parliament, be devested of that Property, and have it transmitted to her Husband by his coming over into England, so that he may dispose thereof at his Pleasure; or by her being married to a Subject of England, should vest in him in France, or in the King here, upon his Attainder before or after Marriage.

Curia.

But as to the Defendant Sir Matthew Decker, he hath done nothing but what he ought, for he is not to pay the Money till secured; therefore it was ordered, that he should assign the Securities to the Lady, and pay the rest of the Money not laid out in Stocks, and that he should have his Costs.

Theobalds *versus* Duffoy.

LESSEE for sixty Years, with a Covenant to renew for 30 Years longer after the Expiration of the first Term, devised this Term to his Wife for Life, Remainder to his Son and Daughter, and soon afterwards died.

Devise of a Term for Years to the Mother for Life, Remainder to the Daughter, this makes an executory Devise.

The Daughter (who was the now Defendant) married an Alien, who assigned his Right to this Term for Years to the now Plaintiff; then the Son who was the Brother of the Defendant died, and immediately afterwards she and her Hus-

Husband assigned all their Right to his Moiety to the same Plaintiff, and renounced the Administration in his Favour.

Afterwards the Mother who had an Estate for Life, as aforesaid, died, and then the Remainder being executed in the now Defendant; she exhibited a Bill to be relieved against this Assignment, because it was only of a bare Possibility of a Term for Years; and it was suggested in this Bill, that the Assignment was obtained by Fraud, but there being no Proof thereof, the Bill was dismissed; and the Lord Chancellor Cowper decreed in Favour of the now Defendant, and in some Time afterwards the now Defendant brought an Ejectment, and recovered this Term at Law, and then the now Plaintiff exhibited this Bill to be relieved against that Verdict.

The Question in this Case was, Whether an Assignment of a Possibility of a Term shall be carried on in Equity against a Verdict at Law, without a sufficient equitable Consideration (which in the principal Case was but 30l.) 'tis plain this Assignment would be void at Law, according to the 6th Resolution in * Lampett's Case; for the Devise being of a Term for Years to the Mother for Life, Remainder to the Daughter, &c. this makes it an executory Devise, and the 6th Resolution in Lampett's Case is, that such an executory Devise cannot be granted over; therefore if such a Grant is void at Law, it should not be established in a Court of Equity.

* 10 Rep. 46.

Curia. If an Estate is granted to A. for Life, Remainder to B. for Life; this is a certain Estate in B. and a transferrable Interest, tho' he may die in the Life-time of A. but if an Estate for Years is granted to A. for Life, and a Grant to B. that he shall have and enjoy the Profits for so many Years as shall be to come and unexpired at the Death of A. this is but a Possibility, because A. hath a greater Estate, for an Estate for Life, is greater than an Estate for Years, be it ever so long; therefore if Lessee for 1000 Years grants it for Life, he hath granted all his Estate, and cannot make any Limitation over.

Term for Years, a less Estate than an Estate for Life, and why.

Now the Reason why a Term for Years was esteemed in Law to be a less Estate than a Freehold for Life, is this:

If. In former Days all Actions were real, and Lands being leased for long Terms and Fines taken for such Leases, it was usual for the Lessors, or their Heirs, to suffer common Recoveries, and by that Means the Lessees were evicted, because they could not falsify those Recoveries, till they were enabled so to do by the Statute * 21 H. 8. by which it was

* 21 H. 8. cap. 15.

enacted, That a Termor might falſify ſuch Recovery, as any Tenant of the Freehold might do by the Courſe of Common Law, where he was neither Privy or Party to the ſame; and that notwithſtanding any ſuch Recovery, he ſhould hold and enjoy his Term, according to his Leaſe againſt the Recoveror, his Heirs and Aſſigns.

'Tis true, in thoſe Days the Terms for Years were uſually granted for a ſhort Time; for no Body would take long Terms, becauſe the Tenant of the Freehold could deſtroy them ad libitum, by ſuffering a Common Recovery, as aforeſaid; therefore thoſe Eſtates for Years were accounted the leaſt, and next to Eſtates at Will.

But when the Statute gave the Termor a Remedy to falſify a Common Recovery in Defence of his Term, then thoſe Eſtates for Years became more permanent, and for that Reaſon the Leſſees took long Terms; and when they could not by the Rules of Law limit Remainders over, in thoſe Terms, they contrived a Method to do it by executory Deviſes, and by Limitations of Truſts which were ſupported in Equity.

Now, tho' in the principal Caſe this ſhould be accounted a bare Poſſibility, and not aſſignable at Law; yet ſince the Defendant her ſelf had aſſigned this Poſſibility, and would now impeach it, becauſe it was an Intereſt not aſſignable at that Time, though it hath ſince veſted in Poſſeſſion; this ſeems contrary to good Conſcience, and a Caſe wherein this Court will interpoſe and hinder her Proceedings at Law.

Beſides, there is another Decree made by the Lord Chancellor Cowper in Favour of the now Plaintiff, which muſt be taken to be Right whilſt it ſtands unreverſed; and till that is done, there ought not to be another Decree in the ſame Court in Favour of the Defendant; and upon the Foot of the former Decree it appears, that the Defendant her ſelf joined with her Huſband in Conveying this Right to the Plaintiff, who is a fair Purchaſer of this Reſidue or Poſſibility of the Term, and all this done by the Conſent of her Friends, which makes the Caſe much ſtronger againſt her; for even a Contract made by an Infant, by the Advice and Conſent of his Friends, hath been decreed to be good, and that in the moſt harſh Circumſtances imaginable, (viz.) By Turning the Intereſt into Principal, upon Condition that the Creditor would not at that Time extend the Lands of the Debtor; and this was the Caſe of the Lady Betty Cromwell, an Infant, who had a good Eſtate in Ireland; but in the Time of the Rebellion there, ſhe could not receive any

Contract made by an Infant, with the Conſent of Friends, is good.

of

of the Rents or Profits of that Estate; and being very much indebted to Sir Henry Every, by Judgments and Statutes, he threatned to extend the Estate which she had in England; which, if he had done, there would not be any Thing left to support her; therefore she, by the Consent and Advice of her Friends, agreed (tho' an Infant) to turn all the Interest then due, into Principal, and to give fresh Security for the Payment thereof; and this Agreement was established against her in this Court, and why should it not against a Feme Covert, who hath done the like by and with the Consent of her Friends; and both she and her Husband were at that Time maintained by the Money which the Plaintiff paid for this Assignment; therefore it was decreed, that there should be a perpetual Injunction against the Defendant.

1 Chanc. Rep. 29, 30. Cases in Chanc. 169.

At the Hearing of this Cause the Attorney General insisted, that the Defendant being married to an Alien, the King was entitled to her Right; and that nothing vested in the Husband by Virtue of this Marriage to avoid it, and that the Assignment could not be good against that Right which the King had in this Term.

The Wife being possessed of a Term for Years, and having married an Alien, the Marriage is not a Gift in Law to him of that Term.

To which it was answered, that if this had been an actual Purchase of a Term of Years by an Alien, the Right would have vested in the King; but here the Alien had no Manner of Right, for this being a meer Possibility, could not vest in him by the Marriage; 'tis true, Marriage is a Gift in Law of a Term for Years to any Subject, but not to an Alien, for his Wife may sue and be sued as a Feme Sole, notwithstanding her Marriage with him.

But to this Matter the Court gave no Answer, probably, because the Decree did not concern any Right which the King might have, it being only to stay the Proceedings at Law, and to quiet the Plaintiff in his Possession.

Bateman *versus* Roach.

Devise to the Mother for Life, Remainder to her Children, &c. she had then one Child, and about four Years afterwards he made a Codicil, and then she had two Children more, who died; they had an Estate in Fee as Tenants in Common.

THE Case, ff. The Testator being seised in Fee, devised his Lands to Trustees and their Heirs, in Trust for his Nephew John Hatheway, and for his Niece Sarah Bateman, for their Lives, Remainder to the Children of the said John, and to the Children of the said Sarah, by her then Husband Bateman, in Trust that they shall have and receive the Profits thereof when they come of Age.

The ſaid John and Sarah had each of them a Child when this Will was made, but the Child of John died, and Mary, (the now Plaintiff) who was the Child of Sarah Bateman ſurvived.

The Teſtator having likewiſe deviſed 400 l. to his ſaid Truſtees, to the Uſe of the ſaid Children, at their reſpective Ages of twenty-one Years; he afterwards made a Codicil, by which he changed one of the Truſtees in his Will, and confirmed all the Deviſes therein; and at that Time Sarah had two other Children, who are ſince dead.

Now the Repreſentatives of the dead Children claiming a Share of the real Eſtate, and a Diſtribution of the 400 l. the Plaintiff exhibited her Bill; and it was inſiſted for her, that this Deviſe being per verba de præſenti, none but the Children born at the Time of the Making the Will could take; like the Reſolution in * Wild's Caſe, which was a Deviſe of Lands to the Husband and Wife, and to the Children of their Bodies; it was reſolved, that if they had any Children at the Time of the Making the Will, they had only an Eſtate for Life; but if they had none at that Time, then thoſe Children who ſhould be afterwards born would have an Eſtate of Inheritance in Tail. * 6 Rep. 18.

But on the other Side it was inſiſted for the Defendant, that tho' there was but one Child at the Making the Will, yet Sarah, the Mother of that Child, having Two more at the Making the Codicil, they were entitled to take by Virtue of the Will, which was confirmed by the Codicil; for the Deviſe is per verba in futuro, and the legal Intereſt was in the Truſtees. Econtra.

The Court was of Opinion, that ſince Sarah had but one Child when the Will was made, the Teſtator could never intend it to be a Deviſe in præſenti, ſo that no other ſhould take but that Child, but rather as a future Deviſe, becauſe it was to the Children of *Sarah Bateman* by her Husband; and 'tis very probable, that if he had intended it for the Plaintiff Mary, who was the only Child at the Time of Making the Will, he would have taken Notice of it in the Codicil, when there were two other Children to ſhare with her; and tho' the Expreſſion as to the Profits, (viz.) That they ſhall have and receive all the Reſt of the Profits (after Legacies paid) when they come of Age; yet they have a Right to it in their Minority, at leaſt to ſo much thereof as may be ſufficient for their Support and Maintenance. Curia.

Upon the Whole, the Court was of Opinion, that these Children took an Estate in Fee, as Tenants in Common; and as to the 400 l. devised to them, that they who died had an equal Right with the Plaintiff Mary, who survived; for 'tis a * standing Rule in this Court, that where a Portion or Legacy is to be paid out of an Estate in Lands, at such a Time, or at such an Age, there, in Favour of the Heir at Law, if the Legatee dies before the Day, the Legacy or Portion is sunk and gone; but 'tis otherwise if the Legacy is to be paid out of the personal Estate (as in the principal Case) for there it vests immediately, and not to be devested, tho' the Legatee die before the Day appointed for the Payment.

* Where a Legacy is to be paid out of Lands at such a Time, there, if the Legatee die before the Day, the Legacy is lost; but if out of the personal Estate, 'tis otherwise.

Therefore it was decreed, that the Trustees should account for the distributive Shares of the two Children (who died) out of the said 400 l. and also for their Shares of the Profits of the Lands, from the Death of their Mother to the Time of their Death, and that they shall have all reasonable Allowances, and Leave to apply to the Court at any Time when they shall find it necessary so to do.

Neeve & al' *versus* Keck.

A Man covenanted for himself and his Heirs, to surrender a Copyhold Estate to such Uses, and died before it was done; and a Bill was brought against his Heir for a specifick Execution of this Covenant, and decreed accordingly.

THIS was a Bill brought by the Daughters and Heirs of Oliver Neeve, by a former Venter against the Defendant, who was Heir at Law to Francis Neeve; and it was to have a specifick Execution of a Covenant to surrender Copyhold Lands made by the said Francis, on the Marriage of Oliver with his second Wife, who was the Daughter of one Sheffeild.

The Bill sets forth, that in Consideration of the said Marriage, the aforesaid Oliver, Francis and Sheffeild, agreed to settle their several Estates to the Uses following:

1st. The Estate of the said Oliver was to be settled to the Use of himself and his intended Wife for Life, Remainder to the First and every other Son and Sons of the Body of the said Oliver, on the Body of A. B. his intended Wife to be begotten, with several Remainders over, Remainder to the right Heirs of the said Oliver for ever; and Mr. Sheffeild agreed to settle his Estate to the Use of himself for Life, and after his Decease, to the Use of the said Oliver, and A. B. his intended Wife for Life, Remainder to the Sons of that Marriage in Tail Male, &c. and Francis Neeve agreed to settle his Estate to the Use of himself and his Wife for Life, with like Remainders to the Sons of Oliver in Tail Male.

And pursuant to this Agreement, the Estates of the said Oliver and Sheffeild were settled to the Uses aforesaid; and the said Francis Neeve in order to keep his Estate in his Name and Blood, and in Consideration of the said Marriage, and of the natural Love and Affection which he did bear to his Cousin Oliver Neeve, and in Consideration of 5s. to him paid by the said Oliver, covenanted for himself and his Heirs to stand seised of the Lands, &c. to the Use of himself for Life, Remainder to his Wife for Life, Remainder to Oliver and his Wife for Life, Remainder to the first and every other Son and Sons of the said Oliver in Tail Male, Remainder to the right Heirs of Oliver for ever; and for the Consideration aforesaid, he covenanted for himself and his Heirs, to surrender his Copyhold Lands to the same Uses before *Michaelmas* following.

Francis Neeve the Covenantor and his Wife are both since dead, and now this Bill was brought against his Heir at Law, to have a specifick Performance of the aforesaid Covenant, having bound himself and his Heirs to perform the same.

The Attorney General who was of Counsel for the Defendant, confessed the Agreement and the Settlements made as set out in the Bill, but insisted, that the Defendant was not obliged to carry this Covenant into Execution; 'tis true, the Settlement made by Francis, was in Consideration of this Marriage, and to keep the Estate in his Name and Blood, and so far Francis would have been obliged to perform this Covenant, and so would his Heir at Law. For the Defendant.

But since the Plaintiffs in this Suit are the Daughters of Oliver by a former Venter, they are not likely to continue the Estate of Francis in his Name, for when they marry, they must change their Names; neither are they within any of the Considerations of this Settlement; therefore in Respect to them, this Covenant stands meerly on the Foot of a voluntary Conveyance, and such a * Covenant was denied to be carried into Execution against an Heir in Favour of a Brother, for no other Reason but because it was voluntary. * 1 Cases in Chan. 245.

It was argued for the Plaintiff, that this was a good and formal Covenant to bind Francis Neeve and his Heirs, and that there was a very good and sufficient Consideration for the same; for the Marriage of Oliver is a Consideration which goes thro' all the Uses of this Conveyance, but if that alone did not go thro' all the Uses, yet Oliver and Sheffeild having settled their respective Estates on this Marriage, those *Econtra* for the Plaintiff.

Settlements together with the Marriage are Conſiderations ſufficient to raiſe all the Uſes therein mentioned.

Now Francis having covenanted for himſelf and his Heirs, to ſurrender his Copyhold Lands before Michaelmas following to the ſame Uſes he had conveyed his Freehold Eſtate; he is a Truſtee in this Court, for the Covenantee, till that is done; and though he did ſurrender within the Time, (viz.) before Michaelmas, according to the Covenant, yet that is not material in a Court of Equity, where there is no Regard had to ſuch Circumſtances of Time or Place when the Eſtate is once bound by the Covenant; and as to the Length of Time before this Bill was brought to have a ſpecifick Performance of this Covenant, it cannot with any Colour of Reaſon be objected to the Plaintiffs, becauſe they commenced this Suit within a Year after the Remainder limited to them veſted in Poſſeſſion.

It hath been objected, that in Reſpect to the Plaintiffs this Covenant is voluntary, and ſtands meerly on the Foot of a voluntary Conveyance, but certainly there is a wide Difference between a voluntary Conveyance and a voluntary Covenant; for if a voluntary Conveyance ſhould be defective, this Court will not inforce the Execution thereof, becauſe it being defective, it doth not bind in Law; but as by a voluntary Covenant a Man is bound in Law, ſo he is alſo bound in Conſcience in a Court of Equity; and the only Reaſon why this Court will inforce a ſpecifick Execution of ſuch a Covenant is, becauſe 'tis a more Adequate Remedy than the Damages which might be given by a Jury on an Action at Law, for Breach of the Covenant.

Therefore ſince Francis Neeve hath bound himſelf and his Heirs by this Covenant, and ſince Oliver was a Purchaſer under it, the Plaintiffs who are his Heirs are likewiſe Purchaſers, and ought to have a ſpecifick Execution of this Covenant, and the rather, becauſe the Widow of Francis enjoyed this Copyhold Eſtate during her Life, by Virtue of this Covenant; ſo that the Defendant hath thereby admitted an Execution thereof in Part of the Uſes limited thereby.

Curia. The Court was of Opinion, that there were ſeveral Conſiderations in theſe Settlements ſufficient to raiſe and ſupport the Uſes; and firſt, 'tis probable that Oliver would not have ſettled his own Eſtate in that Manner which he had done, but in Proſpect of the Eſtate now in Queſtion; for by that Settlement there is no Proviſion made for younger Children; ſo that if there ſhould happen to be a Son of this Marriage, the reſt of the Children would have no-

thing out of their Father's Estate, but what he could provide for them in his Life-time; and sometimes 'tis very prejudicial to a Family where the Father hath a great Estate, and no Power to charge it with Portions for younger Children; as for Instance, this Case happened.

ſi. The Testator devised an Estate of Four thousand Pounds per Annum to the Devisee for Life, Remainder over, but without any Power of making a Jointure to a Wife; afterwards the Devisee settled all his own Estate in Jointure on the Woman he intended to marry, and with whom he did marry, and then he died without Issue; so that the Estate which he took by the Will, went over to him in Remainder, and the paternal Estate was all in Jointure to his Widow, and his next Relations had nothing to support them.

But in the principal Case Oliver Neeve, who married the Daughter of Sheffeild, was made richer, and that might be a Consideration for settling his Estate as he did, and the Widow of Francis enjoyed this Copyhold during her Life, by Virtue of this Covenant by which her Husband had bound his Estate; therefore it was decreed, that the Defendant should surrender this Copyhold to the Use of the Plaintiffs and their Heirs, and at their Expence.

See Peyton *ver.* Bladwell. 1 Vernon 240.

Wing *versus* Wing & al'.

THIS was a Bill brought by the Father against his own Son, and against the Father of his Wife, to have a Deed of Settlement set aside, because not made pursuant to the Articles of Marriage between him and his Wife; wherein the Plaintiff suggests, that he was imposed on, and sets forth several Instances of Oppression by the Contrivance of his own Son and his Father in Law, particularly, that it was agreed in and by the Marriage Articles between the Plaintiff and his Wife on their Intermarriage, to settle his Wife's Estate, (which is the Estate now in Contest) on the Plaintiff and his Wife for their Lives, without Impeachment of Waste, Remainder to their Issue; but that afterwards a Deed of Settlement was made, by which the Plaintiff and his Wife were made Tenants for Life only, and by Consequence subject to be impeached for Waste; that the Plaintiff's Wife died, and then his Son the Defendant married the Daughter of the other Defendant who was an Attorney, and intrusted with all

A Decree was made in the Court of Exchequer against Tenant for Life, to hinder him from committing Waste, which Decree was founded on a Deed of Settlement; and upon a Bill now brought to set that Deed aside, the Defendant pleaded the Decree in the Exchequer, which was overruled.

all the Plaintiff's Papers, and who very well knew all this Matter; and that the Plaintiff having afterwards discovered a Lead-Mine in the Premisses, he made a Lease thereof to one Jones for twenty-one Years, with Power to dig for Lead-Ore, and entered into a Covenant for quiet Enjoyment, and became bound in an Obligation of 1500l. Penalty, conditioned for Performance of Covenants, by Virtue of which Lease the Lessee entered and digged for Lead-Ore, but was obstructed by the Defendant; whereupon the Lessee brought his Action against the now Plaintiff, who was arrested and committed for Want of Bail to the Action, and all this was done by the Contrivance of the Defendants and their Agents.

The Defendants plead a Decree made in the Court of the Exchequer, in Favour of the Son against his Father, to hinder him or his Lessee, to open any Mines, or dig for Lead-Ore, and that a perpetual Injunction was granted against the now Plaintiff.

For the Defendant.

The Counsel for the Defendant argued to maintain this Plea, that there being a perpetual Injunction against the now Plaintiff in a Court which hath a proper Jurisdiction, and can inforce an Obedience to their Decree, it would be inconsistent to have a contrary Decree made between the same Parties in this Court, whilst the first Decree stands unreversed; therefore to obviate that Inconveniency, it was insisted for the Defendant, that this Plea might be allowed.

Besides, the Plaintiff, (as 'tis proved in this Cause) and as it appears in this Deed of Settlement which he would now avoid, had a Power to charge this Estate with 250 l. which might be a Consideration for the leaving out, or for his not insisting to have an Estate for Life, without Impeachment of Waste, which Sum was at that Time a smart Charge on the Lands, being then of the Value of 30 l. per ann. and no more, tho' since the Making the said Articles and Settlement, the Estate is very much improved by a casual Discovery of some Treasure in the Bowels of the Earth, but that cannot be a Reason to make an equitable Construction of this Agreement.

Now if this Settlement should be set aside, it may be difficult to know what Estate the Plaintiff would insist on; for probably he might insist on an Estate-Tail, by Virtue of the Articles, the Limitation being to him and his Wife for their Lives, Remainder to their Issue; and by this Means would strip the Defendant of any Benefit he might claim to those Lands.

Therefore since there is a Decree made in the Court of Exchequer for the now Defendant against a Tenant for Life, to hinder him from committing Waste, or digging Mines, and a perpetual Injunction for that Purpose.

For these Reasons it was insisted, that this Plea might stand, for that this Court cannot control a Decree made in the Court of Exchequer, which is equally binding with a Decree of this Court.

On the other Side the Counsel for the Plaintiff argued, that this Plea might be over-ruled, for that the Decree of the Court of Exchequer was founded on this very Deed of Settlement, which the Plaintiff would now avoid, and of which he now complains, for that Decree is to subsist, and to be supported by that Deed; therefore 'tis inconsistent to plead that to the Plaintiff, which he endeavours by this Suit to avoid. For the Plaintiff.

Besides, the Defendant hath not made any Answer to that Part of the Bill, wherein the Plaintiff prays an Account of the Lead-Ore already dug by the Defendant; for this Decree and Injunction on which he relies, is only to hinder the Plaintiff to dig for Ore in this Land, but it gives the Defendant no Right to dig there during the Life of the Plaintiff; neither doth it preclude him from having an Account of what is already dug by the Defendant or his Agents.

Moreover, a Decree may be obtained in the Court of Exchequer, by Fraud, as well as a Judgment in the Courts of Common Law; and tho' this Court cannot reverse either, yet when the Fraud and Practice appears, they may compel the Parties to take no Advantage thereof, as being against all Conscience and Equity.

Now it appears that this Decree was obtained by Fraud and Oppression; for the Attorney (who is one of the Defendants in this Cause, and whose Daughter married the Plaintiff's Son) had all the Papers of the Plaintiff in his Possession, and concealed them whilst the Proceedings in the Exchequer were carrying on against him; so that he could not make any Defence in that Cause for Want of the Articles which he suppressed.

And 'tis in Proof that the now Plaintiff was in Custody at the Time this Decree was made, and long before; and that it was made ex parte upon an Affidavit of serving him with a Subpœna; so that it being obtained by Fraud in Suppressing the Articles, it cannot be a Bar to the Plaintiff to have an Account of the Profits, and to have this Deed set aside.

It

It was admitted by the Defendant's Counsel, that by the Articles the Plaintiff was to have an Estate for Life, without Impeachment of Waste; but it was insinuated, that before the Deed of Settlement was executed, the Parties came to a new Agreement, by which the Plaintiff had Power to charge the Estate with 250 l. and that might be the Reason why that Clause (without Impeachment of Waste) was left out of the Settlement, which is very true, if the Fact was so; but that very Sum was likewise mentioned in the Articles, which the Plaintiff was to have and receive out of his Wife's Estate; and 'tis not pretended that it was ever paid.

Curia. The Court was of Opinion, that the Decree in the Court of Exchequer, and the Injunction to stay Waste were founded on this Deed of Settlement, which, if set aside, the other must fall of Course; and that there was such an Appearance of Hardship and Oppression in this Cause, that the Court held it reasonable to over-rule this Plea, and told the Defendant's Counsel, that at the Hearing of the Cause they might take what Advantage they could thereof; and then the Court would consider how far this Decree in the Exchequer shall conclude this Court in this Cause.

Wafer *versus* Mocato.

Lessee for Years covenants not to alien without License of the Lessor, under Penalty of forfeiting the Lease; he did afterwards alien without License; Equity will not relieve him.

THE Case, ſ. There was an Agreement between the Plaintiff and the Defendant, that the Plaintiff in Consideration of 1300 l. to be paid to him by the Defendant, should assign a Term of Years, which he had in certain Houses in London, which were leased to him by the City, with a Covenant that the Lessee should not alien or assign the Term without Leave of the City, under the Penalty of forfeiting the said Term.

But the Plaintiff having not yet gotten any License from the City, the Defendant would not take any Assignment of this Term for Years till such License should be procured, but made over 150 l. South-Sea Stock to the Plaintiff, as a Security to perform the Agreement on his Part.

Afterwards, and before any License was procured, the Plaintiff assigned all his Interest in this Term to the Defendant, who prevailed with the Plaintiff, that the Consideration mentioned in the Assignment should be 600 l. and no more, which was done, because the true Value might be concealed from the City, fearing that when the Defendant should renew the Term, the City might raise the Fine and the Rent in Proportion.

Now, it being plain that the Plaintiff could have no Remedy at Law to recover any more than 600 l. that being the Consideration mentioned in the Assignment, and probably not that neither, because having assigned the Term without License from the City, it was a Forfeiture thereof; and by that Means, and by Colour of an Entry and Eviction by the City, the Plaintiff would be barred of his Demands, therefore this Bill was brought to have the 1300 l. according to the Agreement for the Assignment of this Term for Years, and to be relieved upon the whole Matter set forth, as aforesaid.

The Defendant by his Answer insists, that he was to pay but 150 l. South-Sea Stock, for the aforesaid Assignment, and that the Houses were of little Value, and that the Plaintiff had forfeited this Term by Making an Assignment thereof without License, and therefore the Assignment was void.

Where a Man makes a Lease for Life, or for Years, upon a Condition of Re-entry for a Forfeiture, or that the Lease shall be void, if the Lessee assigns or aliens it without License, and afterwards the Lessee doth assign it without License, this is a Forfeiture, and such a Forfeiture against which this Court cannot relieve, because 'tis unknown what shall be the Measure of the Damages; for this Court never relieves but in such Cases where it can give some Compensation in Damages, and where there is some Rule to be the Measure of such Damages to avoid being arbitrary. Curia.

Mitford & al' *versus* Lord Herbert, Pritchard, Croom, *and others.*

Where a Person insisted on an absolute Gift by the Intestate in his Life-time, when it appeared to be only a Trust.

THE Case, *ff.* John Bromley being possessed of a considerable personal Estate, married the Daughter of the Defendant Pritchard, from whom he afterwards departed, and thereupon she obtained a Sentence for Alimony, which he the said Bromley disobeying, he was excommunicated; then he went to Paris, and placed 2000 l. in the Town-house there, in the Lord Herbert's Name, and had a Mortgage on the Duke of Powes's Estate for securing the Repayment of 1000 l. and Interest, and had 240 l. in Ready Money and Jewels in his Trunk, and some wearing Apparel, and died Intestate; after whose Death the aforesaid Croom, one of the Defendants, possessed himself of this 240 l. and of all

the Jewels and wearing Apparel, pretending the same were given to him by the Intestate in his Life-time; and the Widow of the said Bromley having by her Last Will devised some Legacies, made the Defendant Pritchard Executor, and died.

Afterwards Pritchard, by Virtue of the said Will, possessed himself to the Value of 700 l. of the said Intestate's Estate.

Thereupon the Plaintiffs, as Nephews and next of Kin to the said John Bromley, exhibited this Bill to have a Distribution made to them of a Moiety of the said Intestate's Estate; and that tho' Pritchard is entitled to the other Moiety by Virtue of the Will of his Widow, yet he ought to take a Moiety of the bad Debts as well as of the Good; and that the Defendant Croom might be accountable to the Plaintiffs for a Moiety of the said Bromley's Estate in his (Croom's) Hands, notwithstanding the Pretence of a free Gift made thereof to him by the said Bromley, in his Life-time.

For the Defendant.

The Counsel for the Defendant Pritchard submitted to account for a Moiety of the said Bromley's Estate in his the said Pritchard's Hands; but insists, that he is entitled to have an Allowance of such Debts which were owing to him by the Intestate, who having left his Wife, the Daughter of the said Pritchard, without any Support; and being gone into Places remote, she was maintained by the Defendant Pritchard several Years, so that he is entitled to retain so much of her Husband's Estate as shall be accounted a reasonable Satisfaction for such Maintenance, and as a Debt due to him from the Husband.

And as for the pretended Gift to the other Defendant Croom, it will be the Interest of the Defendant Pritchard to have it set aside, for then he, as Executor to the Widow of the Intestate, will be entitled to a Moiety of his Estate in his Hands; for in Truth it was not a Gift, but a Trust in him, contrived between the Intestate and the said Croom, for that the Intestate being excommunicated, could not make a Will; and if he had made one, it could not have been proved; so to avoid this Disability, this Method was contrived between them to dispose the personal Estate in the Life-time of the Intestate.

As for Adderley, another of the Defendants, there being no Proof that he intermeddled with any of the Intestate's Goods, the Bill, as against him, ought to be dismissed with Costs.

So that the chief Contest in this Cause was concerning the 240 l. received by the said Defendant Croom, which as his Counsel insisted, was an absolute Gift to him a few Days before the Intestate's Death, subject to pay two Legacies of 10 l. a-piece, and to pay his Apothecary's Bill, and the Expences of his Funeral; and since being excommunicated, he could make no Will, 'tis the more reasonable he should dispose his Estate in his Life-time in this Manner; and 'tis in Proof, that he often declared, that his own Hands should be his Executors, and that he would give all away whilst he was living; and this is a very natural Disposition to the Defendant Croom, who was his near Relation and Godson, and the Person whom he most trusted during the Time he absconded on the Account of the Excommunication, and the Prosecution by his Wife, and her Friends.

So that 'tis a Donation mortis causa, and that is, where any Thing is given for Fear of Death on some Thoughts of a present or future Danger, which Donation is gratuitous, and an absolute Gift, and the Defendant is properly intitled to the Benefit thereof; and therefore not to account to the Plaintiffs, or any other, for this Gift.

For the Plaintiff.

The Counsel for the Plaintiffs averred, that the Defendant Pritchard had admitted a great Part of what they had prayed in the Bill, but that he insisted on the Allowance of some Debts due to him from his Daughter the Intestate's Wife, and which he ought not to retain out of the Money in his Hands, but out of all the Moiety of the Intestate's Estate to which he was intitled by Virtue of her Will.

And as for what is insisted on by the Defendant Croom, that the Intestate in his Life-time gave him the 240 l. now in his Hands, there is no Colour that he should not account for it; for admitting it was a Donation mortis causa, such a Gift is good by the Civil Law as a Will; but by that Law an excommunicated Person cannot make a Will, for if he could, then such Persons might dispose of their Estates by Will in this Manner.

Neither was this an absolute Gift to the Defendant Croom, for 'tis in Proof, that it was a bare Trust; and this appears by the best Proof that can be made, and that is Testimonium Rei, for after the Delivery of the Goods, and the Receipt of this Money, the Intestate appointed Croom to pay such Debts and Legacies to his Nephews; besides, there is a very strong Presumption, that the Testator was not of a disposing Memory at the Time of making this pretended Gift, for he said it was all which he had in the World;

the Jewels and wearing Apparel, pretending the same were given to him by the Intestate in his Life-time; and the Widow of the said Bromley having by her Last Will devised some Legacies, made the Defendant Pritchard Executor, and died.

Afterwards Pritchard, by Virtue of the said Will, possessed himself to the Value of 700 l. of the said Intestate's Estate.

Thereupon the Plaintiffs, as Nephews and next of Kin to the said John Bromley, exhibited this Bill to have a Distribution made to them of a Moiety of the said Intestate's Estate; and that tho' Pritchard is entitled to the other Moiety by Virtue of the Will of his Widow, yet he ought to take a Moiety of the bad Debts as well as of the Good; and that the Defendant Croom might be accountable to the Plaintiffs for a Moiety of the said Bromley's Estate in his (Croom's) Hands, notwithstanding the Pretence of a free Gift made thereof to him by the said Bromley, in his Life-time.

For the Defendant.

The Counsel for the Defendant Pritchard submitted to account for a Moiety of the said Bromley's Estate in his the said Pritchard's Hands; but insists, that he is entitled to have an Allowance of such Debts which were owing to him by the Intestate, who having left his Wife, the Daughter of the said Pritchard, without any Support; and being gone into Places remote, she was maintained by the Defendant Pritchard several Years, so that he is entitled to retain so much of her Husband's Estate as shall be accounted a reasonable Satisfaction for such Maintenance, and as a Debt due to him from the Husband.

And as for the pretended Gift to the other Defendant Croom, it will be the Interest of the Defendant Pritchard to have it set aside, for then he, as Executor to the Widow of the Intestate, will be entitled to a Moiety of his Estate in his Hands; for in Truth it was not a Gift, but a Trust in him, contrived between the Intestate and the said Croom, for that the Intestate being excommunicated, could not make a Will; and if he had made one, it could not have been proved; so to avoid this Disability, this Method was contrived between them to dispose the personal Estate in the Life-time of the Intestate.

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So that 'tis a Donation mortis causa, and that is, where any Thing is given for Fear of Death on some Thoughts of a present or future Danger, which Donation is gratuitous, and an absolute Gift, and the Defendant is properly intitled to the Benefit thereof; and therefore not to account to the Plaintiffs, or any other, for this Gift.

For the Plaintiff.

The Counsel for the Plaintiffs averred, that the Defendant Pritchard had admitted a great Part of what they had prayed in the Bill, but that he insisted on the Allowance of some Debts due to him from his Daughter the Intestate's Wife, and which he ought not to retain out of the Money in his Hands, but out of all the Moiety of the Intestate's Estate to which he was intitled by Virtue of her Will.

And as for what is insisted on by the Defendant Croom, that the Intestate in his Life-time gave him the 240 l. now in his Hands, there is no Colour that he should not account for it; for admitting it was a Donation mortis causa, such a Gift is good by the Civil Law as a Will; but by that Law an excommunicated Person cannot make a Will, for if he could, then such Persons might dispose of their Estates by Will in this Manner.

Neither was this an absolute Gift to the Defendant Croom, for 'tis in Proof, that it was a bare Trust; and this appears by the best Proof that can be made, and that is Testimonium Rei, for after the Delivery of the Goods, and the Receipt of this Money, the Intestate appointed Croom to pay such Debts and Legacies to his Nephews; besides, there is a very strong Presumption, that the Testator was not of a disposing Memory at the Time of making this pretended Gift, for he said it was all which he had in the World;

ſo he forgot a great Sum which he had in the Town-Houſe at Paris, which can never be intended, if he had been in his Senſes.

Curia. The Court was of Opinion, that this was an odd Claim by the Defendant Croom, as an abſolute Gift of this 240l. when it plainly appears to be a Truſt.

'Tis true, he ſwears in his Anſwer, that the Inteſtate gave him all his perſonal Eſtate, and directed him to pay the Apothecary's Bill, and 10l. apiece to his two Nephews; but this Direction was ſubſequent in Time to this pretended Gift, and that proves it to be a Truſt for the Inteſtate.

Therefore it was decreed, that the Defendant Croom ſhould account, and that the Bill ſhould be diſmiſſed with Coſts as to Adderly, and as for the other Defendant Pritchard, that he ſhould be allowed what was due to him for the Maintenance of the Inteſtate's Wife whilſt he was living, but not for her Maintenance ſince her Husband's Death; but he is not intitled to Coſts of this Suit, unleſs they had been taxed, and aſcertained in the Life-time of her Husband.

Ord *verſus* Blackett.

Where a Perſon was reported by a Maſter to be a fit Guardian to a natural Child; yet ſuch Guardian was not allowed, but the Child was placed with the Father who owned her.

THE Caſe, ſt. One Ord who was ſeiſed of an Eſtate worth 400 l. per ann. had a natural Daughter by Sir William Blackett, to which Daughter ſhe deviſed all her Eſtate, and made her Siſter Martha Ord Executrix, and appointed her to be Guardian to the Infant, and died.

The Executrix purſuant to the Will, ſued for this Eſtate, but died ſoon after the Suit was began, having firſt appointed the now Petitioner Ord Executrix, who renewed the Suit, and recovered the Lands for the Infant.

But Sir William Blackett removed her from School laſt Chriſtmas, and ſent her into the Country where ſhe hath been kept ever ſince; for which Reaſon the Petitioner made Application to the Court of Chancery, complaining that the Infant was removed from a School where ſhe might have proper and ſuitable Education, and ſent into the Country where ſhe could have none; and this Petition being referred to a Maſter to name a proper School, and a Guardian for this Infant, he reported the Petitioner to be a fit Guardian, and Mr. Cavalrie's School a proper School for her Education; and therefore petitioned that the Child might be delivered to her, and ſent to the ſaid School.

The Counſel for Sir William Blackett, the Child's Father, and who owns her as his Daughter, and who preſerved this Eſtate for her againſt the Heirs at Law, conſented to ſend the Child to Mr. Cavalrie's School, but oppoſed the Delivery to the Petitioner, or that ſhe ſhould have the laying out any Money for Cloths, or other Neceſſaries for the Child, ſhe being very poor, and having already pretended, that ſhe deſerved 180l. for her Care in attending this Child; therefore the Money to be laid out for Neceſſaries ought rather to be paid to Mr. Ca. or his Wife, than to the Petitioner. Curia.

The Court was of Opinion, that Removing this Child from School into the Country, to Sir William Blackett's Houſe, could neither be uſeful or inſtructive to her, becauſe he was a ſingle Man, and kept no Perſons proper for her Education; yet it was not thought reaſonable to remove her from his Care ſince he owned her to be his Child; but that he ſhould pay the Coſts of the Petitioner's Application to the Court out of his own Money; for otherwiſe he might remove her from one School to another, and the Coſts of applying to this Court, would be paid out of the Infant's Eſtate. Curia.

Smithſon & al' *verſus* Dodſon.

THIS was a Bill brought by the Pariſhioners of Gargrave in Yorkſhire againſt the Defendant their Vicar, to produce an ancient Terrier in his Cuſtody, which ſhews the Method of Payment of Tithes in that Pariſh, which they ſuggeſt to be a Modus, (viz.) For Hay the Vicar is to have the 10th Graſs-Cock, and 3 Half-pence for every Milch-Cow, and a Penny for every ſwarm of Bees, and Six-pence for every Orchard, and the Bill prays, that the Court would direct an Iſſue or Trial at Law, to ſettle this Modus; and ſets forth, that the Predeceſſor of the Defendant did about 30 Years ſince alter the Payment of this Modus, and combined at that Time with his Clerk to raiſe the Fees for Burials, &c. which Fees had been paid ever ſince. Tithes of Hay ought to be paid in Graſs-Cocks.

The Defendant admits there was a Modus ſome Years ſince for Payment of Tithes in this Pariſh, and that he hath a Terrier in his Cuſtody of all the Tithes payable to the Vicar, and that he had been very much harraſſed at Law, when he was willing to take the Tithes according to the Terrier in his Cuſtody, ſo as he might have them peaceably; and as to the Fees for Burials, Marriages, Chriſtenings, and Churching of Women, he in-

inſiſts, that the ſame ſhould be paid as uſual; for that they were not proper for a Modus, becauſe there is no Canon to aſcertain what ſhall be paid, if the Sums now paid ſhould be diſcharged; but 'tis not in other Caſes, for if a Modus ſhould be diſtroyed, then Tithes in Kind muſt be paid; therefore as to that Matter, the Bill is improper, and ought to be diſmiſſed ſince the Court hath nothing before them to aſcertain the Meaſure of ſuch Fees; and the Defendant is in no Fault, but by continuing the Payment of the Fees as he found them paid before he was Vicar.

Curia. The Court held, that the Tithe-Hay muſt and ought to be paid in Graſs-Cocks, and as to the Tithes of Cows, Bees, and Orchards, the Parties did not differ in the manner of Payment, but only in the Surplice Fees for Burials, &c. therefore it was ordered that they ſhould attend a Maſter to ſettle how far they differ in that Matter, and the Conſideration of Coſts ſhould be reſerved till the Maſter makes his Report; but as to that Part of the Plaintiff's Demands which the Defendant did not controvert, nor inſiſt on any Thing to the contrary, the Pariſhioners were ordered to pay Coſts.

Where the Pariſhioners ſhall pay Coſts.

Lucas *Executor of* R. A. *verſus* Adams.

The Obligor on Payment of 20 *l.* to the Obligee procured a Bond and Notes for Money to be delivered up to him upon Pretence that he was poor and nearly related to the Obligee; but that not being proved, he was ordered to account for the Bond and Notes.

THIS was a Bill brought by the Executor of Sir Robert Adams to have an Account of 300 l. borrowed of him by the Defendant Adams, for the Payment of which ſaid Sum with Intereſt, the Defendant entered into a Bond to the ſaid Sir Robert Adams of the Penalty of 400 l. conditioned for the Payment of 200 l. and at the ſame Time gave him two Notes under his Hand of 50 l. each Note, but afterwards by unfair Means, prevailed on the Obligee who was ſuperannuated, and not in his Senſes to give him (the Defendant) a Releaſe of all Demands on the Payment of 20 l. and on Pretence of being his near Relation.

The Defendant by his Anſwer ſays, that he being nearly related to Sir Robert Adams, did borrow the Money of him as mentioned in the Bill; but being Poor, he the Obligee when he was in his perfect Senſes, (viz.) Anno 1714. promiſed to forgive him this Debt, which in the Year following, (viz.) Anno 1715. he did accordingly forgive, therefore inſiſts, that he is not liable to account for it to the Plaintiff.

And now his Counsel did admit, that there was an Inquisition taken, by which Sir Robert Adams was found to be out of his Senses; which Inquisition was taken in the Year 1720, but goes no farther back than three Years, (viz.) to the Year 1717; and this Debt being discharged in the Year 1715, the Defendant is willing to try, Whether the Obligee was then in his Senses, or not?

The Counsel for the Plaintiff said, that if the Court should make the least Difficulty to decree for the Plaintiff upon Reading his Proofs in this Cause, that he would then be willing to try it at Law, Whether the Obligee was in his Senses at the Time he executed this Release; but if upon the Proofs it should appear that he was not in his Senses, then the Plaintiff ought not to be sent to a Trial of that Matter at Law. *Econtra* for the Plaintiff.

'Tis true, the Defendant swears in his Answer, that he did believe that the Obligee had not forgot either the Bond or the Notes at the Time of his Sealing this Release, which he obtained as his near Relation, but gives no Manner of Proof how, or how near he was related, which he ought to have done, because 'tis the pretended Consideration of this Release; therefore if that fails (as it doth) the Rest must fall of Course; as where the Testator devised 100 l. to T. S. by the Name of his Cousin T. S. when in Truth he was not related to the Testator, in such Case the Legatee shall never have this Legacy.

Besides, there is no Manner of Proof, that any such Consideration of Nearness of Relation was mentioned at the Time the Release was executed, but that the Defendant brought 20 l. and told the Obligee that he had a Bond, which he came to pay, and immediately on Payment of the said Money he got up the Bond, and obtained this Release; but after all, the Payment of the said 20 l. is inconsistent with the pretended Consideration of Nearness of Relation, which the Defendant hath set forth in his Answer.

Here is a Bond got by the Obligor from a weak Person, the Obligee, and a Release of all Demands, upon Pretence of Nearness of Relation, and of being poor; but neither of these Considerations are proved in the Cause. Curia.

But it plainly appears that the Obligor paid 20 l. as a Consideration of this Release; and there being no Notice taken at that Time, of what Sums were due, either on the Bond or Notes, this seems to induce a Suspicion, that the Payment of that Money was the only Consideration of Delivering

livering them up, and executing this Releaſe; and that the Obligee did not know at that Time that any Thing more was due to him, being very weak and forgetful, and incapable of tranſacting any Buſineſs; ſo it was decreed, that he ſhould account both for the Bond and Notes.

Cox & al' *verſus* Coffin & al'.

Bill againſt a Mortgagee to compel him to reconvey upon Payment of Principal and Intereſt.

THE Plaintiff, who was Heir at Law, exhibited a Bill to redeem a Mortgage made by his Anceſtor; and the Caſe upon the Pleadings was thus:

ſt. One Butchin having Occaſion for Money, borrowed it of one Fry, and to ſecure the Repayment thereof, with Intereſt, he mortgaged his Lands to the ſaid Fry for 2000 Years: Proviſo to be void upon Payment of the Principal and Intereſt; and ſoon afterwards he died.

In the Year 1696, the Plaintiff and her Siſter, who were Heirs at Law to the Mortgagor, exhibited their Bill to redeem, and the Defendant Coffin was employed by them to proſecute the Suit; and Fry the Mortgagee, in his Anſwer to that Bill, ſubmitted to a Redemption upon Payment of the Principal and Intereſt; but Coffin perſwaded them (being ignorant Women) to drop that Suit, alledging that the Lands were not worth redeeming.

Fry the Mortgagee, ſome Time afterwards, by Will, deviſed this Term and Eſtate to one Grove, whom he made Executor, and died; and then the now Defendant, Coffin, purchaſed it of the ſaid Grove, and by his Agent Willis, threatned the now Plaintiffs to exhibit a Bill to foreclose them of the Equity of Redemption.

The now Defendant Coffin, after he had purchaſed this Term of Grove for 100 l. in Conſideration of ſo much Money paid to him, aſſigned Part of the Eſtate to one Lake for 500 Years, being Part of the ſaid Term of 2000 Years, and afterwards ſold the Remainder of the Term to Willis.

Now the End of this Bill was, that the Defendant Coffin, who knew the Plaintiff's Title, and by unfair and fraudulent Means, diſſwaded them from purſuing their Right, and afterwards purchaſed this Mortgage for himſelf, may be obliged to reconvey, upon Payment of ſo much Money, which he paid for the Purchaſe.

And the Counſel for the Plaintiffs ſaid, that there were two Things to be conſidered in this Cauſe.

5 (1.) If

(1.) If this is a redeemable Estate, and if so, then,
(2.) On what Conditions it shall be redeemed.

(1.) And as to the first Point, 'tis plain that this is a redeemable Estate; for upon Filing the first Bill, Fry, the original Mortgagee, under whom the Defendant claims, submitted to a Redemption; but the Defendant Coffin, who was then Solicitor for the Plaintiffs, dissuaded them to redeem; and the other Defendant Willis, who acted for Coffin, threatned to foreclose the Equity of Redemption; now this shews, that he knew it was a redeemable Estate; therefore the Plaintiffs are entitled to redeem.

(2.) As to the second Point, upon what Terms the Plaintiffs shall redeem, it was insisted, that they should redeem upon Payment of the principal Sum of 100 l. and Interest, which said Sum of 100 l. the Defendant Coffin paid to Grove, upon the Purchase of this Term; for as he was Solicitor for the Plaintiffs, he is to be taken as a Trustee for them, and therefore should be contented to receive what he paid for them, deducting the Rent.

And as for Lake, who took the Term of 500 Years of Coffin, this seems to be a Trust for him; but if it was granted to him bona fide, without any Trust; yet he took it with his Eyes open, and shall not be in a better Condition than Coffin, under whom he claims; therefore it was insisted for a Decree to redeem, &c.

DE

Term. Sanct. Hill.

11 Georgii. In Cancellaria.

Lands devised to his Wife and her Heirs, to be sold for Payment of Debts and Legacies in Aid of the personal Estate; and not being sold, if the personal Estate is sufficient to discharge the Whole, the Heir shall have the Lands as a resulting Trust.

Buggins *versus* Yates.

THE Case, ſt. One Buggins being ſeiſed in Fee of ſeveral Eſtates in Middleſex and Worceſterſhire, Anno 1674, deviſed the Lands in Queſtion to Mary Buggins, his Wife, and to her Heirs and Aſſigns for ever, to be ſold to pay his Debts and Legacies in Aid of his perſonal Eſtate.

But the perſonal Eſtate being ſufficient to ſatisfy and diſcharge all his Debts and Legacies; and the real Eſtate not being ſold, the Plaintiff, as Heir at Law to the Teſtator Buggins, inſiſted, that he is entitled to theſe Lands as a reſulting Truſt for him, and that the Deviſee was a Truſtee for that Purpoſe.

Curia.

The Court was of Opinion, that where Lands are deviſed to be ſold in Aid of the perſonal Eſtate for Payment of Debts and Legacies, and the Lands are not ſold, for that the perſonal Eſtate is ſufficient to diſcharge the Whole; 'tis plainly an implied Truſt in the Deviſee for the Heir at Law, and he is entitled to come into this Court to have a Reconveyance, and an Account of the Profits.

He did not doubt but his Wife would be Kind to his Children; this is void for Incertainty.

And the Court being about to make the Decree, it was ſaid, that here was likewiſe a Truſt of the perſonal Eſtate, (viz.) The Teſtator in his Will declared, that he did not doubt but his Wife would be Kind to his Children; but the Court was Opinion, that thoſe Words gave a Right to no Child in particular, or a Right to any particular Part of the

Eſtate, but that the Clauſe was void for Incertainty; and thereupon it was decreed, that the Defendant ſhould make a Reconveyance of the real Eſtate.

But then it was inſiſted for the Defendant, that the Court would direct an Inquiry of the Value of the Teſtator's perſonal Eſtate, becauſe it appeared in the Cauſe, that there was 6900 l. ſtanding out in Debts and Legacies; and that the perſonal Eſtate amounted to 4000 l. and no more, ſo that if the Deviſee paid the reſt of the Debts and Legacies out of her own Effects, ſhe is intitled to be repaid out of theſe Lands deviſed to her; and there is a very ſtrong Preſumption, that ſhe paid to the Value of this Land; for there is a Legacy of 2000 l. deviſed to her, which ſhe never raiſed, becauſe ſhe apprehended the Eſtate was her own, being deviſed to her and her Heirs; and therefore ſhe deviſed it to her ſecond Husband Yates for Life, which he enjoyed 22 Years under that Deviſe, and ſhe likewiſe deviſed the Inheritance in Parcels to her three Sons, (viz.) To the Plaintiff, and the Defendant, and to another Son ſhe had by her Huſband Buggins; and the Plaintiff after the Death of Yates the ſecond Husband, entered by Virtue of that Deviſe; and by his Bill he claims under the Will of Mary Yates, ſo that he admits ſhe had a Power to deviſe, which is enough to affirm the Right of the Defendant.

Beſides, there is another Thing to be conſidered in this Cauſe, (viz.) Mary Buggins the Widow of the Teſtator, upon her Intermarriage with Yates, reſerved a Power to diſpoſe this Eſtate as ſhe ſhould think fit, notwithſtanding her Coverture, and after the ſaid Marriage, ſhe deviſed it to her Husband Yates for Life as aforeſaid, Remainder in Parcels to her three Sons and their Heirs; provided that if any, or either of her Sons died under 20 Years, and without Iſſue, that the Share of him or them ſo dying, ſhould go to the Survivor or Survivors.

Now John Buggins one of her Sons died under twenty Years, and without Iſſue, ſo that the Lands which were deviſed to him muſt deſcend to the Plaintiff and the Defendant equally; for this being a common Contingency, and having happened, whether 'tis by Limitation of an Uſe, or by executory Deviſe, the Remainder over is always good.

The Court was of Opinion, that this could not be an executory Deviſe, becauſe the Teſtatrix was a Feme Covert; but the Defendant's Counſel preſſing for an Inquiry into the Value of the perſonal Eſtate of the Teſtator Buggins, tho' it ſeemed hard to grant it after ſuch a Length of Time, Curia.

unleſs there was a very great Surplus; yet an Account was directed to be taken thereof, and that all the Deeds and Writings concerning this Eſtate ſhould be brought before the Maſter; and the Conſideration of this Remainder over ſhould be reſerved until the Account of the perſonal Eſtate was taken; and then it would appear what Right the Teſtatrix had to deviſe all or any Part, and what Part of this Eſtate.

Sir John Fryar *verſus* Vernon.

Where Proceſs of this Court will not affect Lands in *Ireland*, to ſequeſter them for a Contempt.

UPON a Motion for a Sequeſtration of the Defendant's Eſtate in Ireland, for a Contempt to this Court; the Maſter of the Rolls was of Opinion, that ſuch Sequeſtration could not be granted, or at leaſt that he would be well adviſed before he would grant it; for that the Proceſs of this Court could not affect any Lands in Ireland, the Practice in ſuch Caſes being to make Affidavit, that the Perſon ſtanding in Contempt is here in England, and being afterwards taken upon Proceſs, the Court will oblige him to give Bail to abide and perform their Decree.

Whitechurch *verſus* Whitechurch. *Before the Lords Commiſſioners* Raymond *and* Guilbert.

The Mortgagee had a Term for 500 Years and afterwards took another Term of the ſame Lands for 1000 Years in the Name of a third Perſon, to commence after the Determination of the firſt Term, in Truſt for himſelf; and afterwards he purchaſed the Fee-ſimple in his own Name; and then he deviſed the ſaid Lands to *E. G.* for Life, Remainder in Tail, *&c.* This Will was void ſo as to paſs the Lands, becauſe not atteſted by three Witneſſes, but it was inſiſted that it was good to paſs the Term of 1000 Years as a Term in groſs, and ſeparated from the Inheritance; but decreed that it was a Term which attended the Inheritance by Implication of Law; for 'tis not expreſly deviſed for that Purpoſe, and there is no apparent Intention, that the Teſtator deſigned to paſs it as a ſeparate Intereſt.

THE Caſe was, ſt. One Whitechurch, the Anceſtor of the Plaintiff, had a Mortgage for Five hundred Years of the Lands now in Queſtion, and took another Term for Two thouſand Years of the ſame Land, to commence after the Expiration or Determination of the firſt Term; and to avoid a Merger thereof, he got it conveyed to another Perſon in Truſt for the Mortgagee; and afterwards he purchaſed the Inheritance in his own Name, and it was conveyed to him accordingly, ſo that he had the legal Eſtate of that Term of Two thouſand Years, together with the Inheritance in himſelf.

Afterwards by Will he devised the said Lands to the Defendant Whitechurch for Life, Remainder to his first, and every other Son and Sons in Tail Male, and made T. S. his Executor, and died.

Now this Will was not executed according to the Statute, for tho' it was all of the Testator's Hand-Writing, and signed by him; yet it was not attested by three Witnesses, as required by the Statute, but the Executor having assented to the Legacy, the Defendant was (as he insisted) possessed of the legal Estate of this Term of 2000 Years.

However, the Will being not good to pass the Inheritance, the Plaintiff as Heir at Law to the Testator exhibited his Bill against the Devisee, and against the Executor, and against the Trustee of the Term of 2000 Years, to compel them to assign both the said Terms to a third Person in Trust, to attend and protect the Inheritance for him, that being the only Use of such Terms for Years as he insisted.

It was argued for the Defendant, that the principal Point to be considered in this Case, is what Estate the Testator had in him at the Time he made this Will; and to judge rightly of that Matter, some Consideration must be had both of the Principals of Law and Equity; now a Term attending on the Inheritance, is in Equity to be considered of no other Use than to protect the Inheritance, tho' at Law 'tis a separate Interest, and if 'tis only to protect the Inheritance, then the Testator had no other Estate when he made his Will, but an Inheritance which he had chiefly in Contemplation, and intended to pass at that Time. For the Defendant.

'Tis true, if there had been any express Declaration of the Testator's Intention in this Will to pass the Term exclusive of the Inheritance, there it might pass; but it plainly appears he intended only to pass the Inheritance, and there is nothing in the Will which necessarily implies a separate Devise of this Term.

It was said, that where a Man is seised of an Inheritance, and has an unmerged Term in Notion of Law, and he devises the Inheritance, the Devisee may in this Court compel the Executor to convey the Term to a Trustee to attend and protect the Inheritance, because the Term is in the Executor, upon that Trust only, and 'tis very wrong to affirm, that when the Inheritance doth not pass, that the Heir at Law cannot compel such Executor to assign the Term.

It was resolved in the Case of the Creditors of the Earl of Pembroke by Simple-contract, that they should be paid out of an unmerged Term he had in him, because such a Term was a

Chat-

Chattel liable to their Demands; but if the Term had been in a Truſtee for the Earl, it had been otherwiſe.

So in the principal Caſe, tho' the Will is not ſufficient to paſs the Inheritance, becauſe it wants that Requiſite which the Statute directs; yet 'tis ſufficient to paſs this Term to the Defendant, who having the legal Eſtate therein, this Court will not interpoſe and take it from him in Favour of the Heir who is a Volunteer; for 'tis a Rule in Equity never to interpoſe in Favour of one Volunteer, to the Prejudice of another, but to let him who hath the Law on his Side take Advantage thereof, eſpecially where the Intereſt of a Purchaſer for a valuable Conſideration doth not interpoſe; ſo that upon the whole it was inſiſted, that this unmerged Term in the ſame Perſon is to all Intents as a Term in Groſs, and ſhall paſs by this Will as a Chattel Intereſt.

Curia. Baron Guilbert was of Opinion, that this was a Term attending the Inheritance, and to protect the ſame from intermediate Incumbrances, and that an unmerged Term in the ſame Perſon is in him in Nature of a Truſtee to attend the Inheritance; and that it would be very dangerous to all the Inheritances in England, if unmerged Terms ſhould be taken to be Terms in groſs in the Owners of the Inheritances, and paſs as ſuch.

Now in the principal Caſe, if this ſhould be conſtrued as a Term in groſs, then 'tis ſuch a Chattel Intereſt as may paſs by this Will, tho' all the Solemnities required by the Statute are not obſerved, but if 'tis a Term annexed unto, and attending the Inheritance, it cannot paſs by this Will in any other Manner than the Inheritance would paſs.

Now it hath been allowed at the Bar, that the Term for 2000 Years is annexed to the Inheritance, but the Term for 500 Years is not; but no Reaſon was given why there ſhould be ſuch a Difference between theſe two Terms, that one ſhould, and the other ſhould not attend the Inheritance; and certainly it can never be ſaid with any Colour of Reaſon, that where a Mortgagee of a Term of Years purchaſeth the Inheritance, that ſuch Term when in himſelf, and unmerged, ſhall go and deſcend in another Courſe different from the Inheritance; for 'tis the conſtant and uniform Conſtruction in this Court, that ſuch a Term ſhall be annexed unto, and protect the Inheritance, and attend the ſame; and it would be a dangerous Conſtruction in Equity to make the Inheritance and the Term ſeparate and diſtinct Eſtates in one Perſon.

The other Commissioner Raymond differed a little; he was of Opinion, that where the Testator expressly deviseth such a Term, or where it comes to an Executor by Implication, as a Chattel Interest, (viz.) By a Devise of all his Chattels; or where it vests in an Administrator generally, without making any Will; in such Cases the Heir at Law would be proper to apply to this Court to have the Term assigned to another to attend and protect the Inheritance; but that since 'tis agreed on all Hands, that this Term passeth at Law, 'tis a Question, Whether this Court can take it from him to whom 'tis devised, in Favour of the Heir at Law, who is a Volunteer as well as the Devisee.

'Tis true, where a Term is expressly limited to attend the Inheritance, there tho' the Testator likewise expressly deviseth it to another, it will not pass; but where it attends the Inheritance only by Construction or Operation of Law, or in an equitable Notion, as a Term bought in and assigned by Creditors, or Terms raised for Childrens Portions, or for other particular Purposes; there, if the Testator expressly deviseth such Terms, they will pass.

But where a Man hath a Term for Years, which by Intendment of Law only attends the Inheritance, certainly he hath a Power to sever such a Term from the Inheritance; and if he should assign it to one Man and Mortgage the Inheritance to another, in such Case the Term shall not attend the Inheritance, but it becomes a Term in gross; and why should not a Man have the like Power to do the same Thing by Will, if he thinks fit.

But there is this farther to be considered in the principal Case, that as in this Will there is no apparent Intention, that the Testator designed to pass this Term as a separate Interest from the Inheritance, tho' there are sufficient Words to pass it in general; then, Whether such general Words shall after the Death of the Testator, sever this Term from the Inheritance, which attended and protected it in Notion of Equity, before such Devise was made.

But this Point was not debated, for it was decreed that the Term did not pass by this Devise, which plainly appeared to be of the Inheritance only, without any Intent to pass the one, exclusive of the other; therefore the Court was clear in Opinion, that the Term should not be severed from the Inheritance, and pass to the Devisee by the general Words of this Will, tho' there were sufficient Words to pass it, if it had been a Term in Gross, and that the Executor of this

Will

Will was a Truſtee for the Heir at Law, and his Aſſent to the Legacy was of no Effect, but that the Term was ſtill in him to perform the Truſt, which he was obliged to execute.

Then another Queſtion was made, and ſtrongly inſiſted on by the Attorney General, (viz.) That the Deviſee being an Infant, the Decree ſhould not be final on him, but that he might have Leave to ſhew Cauſe againſt it within ſix Months after he came of Age.

But the Court was clear in Opinion, that the Decree ſhould be final, for that in Caſes of Truſts Infants are always bound by Decrees of this Court, and ſo they are where the Will of the Anceſtor is conteſted; and 'tis either ſet aſide or confirmed in Equity after Trial of an Iſſue Deviſavit vel non, or where 'tis otherwiſe ſet aſide without a Trial at Law; and there is ſcarce any Caſe where an Infant hath Time to ſhew Cauſe againſt a Decree, but where 'tis neceſſary for him to join in a Conveyance in order to compleat the Eſtate, and where ſuch Conveyance is of the Inheritance, as in Decrees of Foreclоſure of Mortgagors, &c.

Reeves *verſus* Reeves.

By Marriage-Articles the eldeſt Son was made Tenant in Tail: *Proviſo*, That the Father might ſell the Lands by the Conſent of the Truſtees, and purchaſe other Lands, and ſettle them to the like Uſes; he purchaſed other Lands, but did not ſettle them to the like Uſes, yet held good.

1673. THE Caſe, ſi. The Father of the Plaintiff and the Defendant, in Conſideration of his Marriage with their Mother, and of a Portion in Money, did, in the Year 1673, Article to ſettle his Eſtate to the Uſe of himſelf for Life, then to his intended Wife for Life, then upon Truſtees to preſerve contingent Remainders, then to the firſt Son of that Marriage, and to all and every other the Sons, &c. in Tail Male, with ſeveral Remainders over, with Power to make a Jointure to any other Wife of 1000 l. per Annum; and a Proviſo, That it ſhould be lawful for him, by and with the Conſent of the Truſtees, to ſell the Eſtate; and with the Money ariſing by ſuch Sale to purchaſe other Lands, and to ſettle the ſame to the like Uſes as in the ſaid Deed dated Anno 1673.

1692. Afterwards the Father ſold the Lands, and with the Money purchaſed other Lands now in Queſtion; and in the Year 1692, he ſettled the new purchaſed Lands, by and with the Conſent of the Truſtees in the firſt Settlement, to the Uſe of himſelf for Life, Remainder to the Defendant for Life (who by the firſt Settlement had an Eſtate-tail) Remainder to Truſtees to preſerve contingent Remainders; then to

his first and every other Son in Tail Male, with several Remainders over, with a Power to make a Jointure to any Woman he should marry, of the yearly Value of 600l. and soon after the Father died.

Then the Defendant, who was his eldest Son, in Consideration of his Marriage, and of a Marriage-Portion, by Deed dated 1698, conveyed the new purchased Lands to Trustees to the Use of himself for Life, then to his intended Wife for Life, then to Trustees to preserve contingent Remainders, then to his First and every other Son in Tail Male, with several Remainders over. 1698.

The Defendant, Thomas Reeves, having only a Daughter, and no Issue Male by his said Marriage, would now sell these Lands, alledging, that the Remainders limited to the Issue Male were voluntary, not being within the Consideration of the Settlement made by him in the Year 1698.

Therefore this Bill was exhibited by the next in Remainder to obstruct the Sale, and to oblige the Trustees to enter to preserve the contingent Remainders; and that the Deeds and Evidences may be brought into Court to know how the Title stands, he suggesting, that by the Marriage Articles of their Father, dated anno 1673, he covenanted to settle his Estate as aforesaid, but with a Proviso to sell the same, by and with the Consent of the Trustees, and to purchase other Lands, and to settle them upon the same Uses, as in the first Settlement, &c.

And it was argued for the Defendant, that the Settlement in 1673, made upon the Marriage of the Father, both of the Plaintiff and Defendant, tho' mentioned to be by Articles only, was, and is a good Settlement by Way of Covenant to stand seised; and that the Defendant is by the express Words of that Settlement made Tenant in Tail of the Lands sold; and the Proviso being to settle the new purchased Lands to the same Uses as in the first Settlement; it was not in the Power of his Father to make him Tenant for Life by any other Settlement whatsoever, so that he must still remain Tenant in Tail of the new purchased Lands; and that Settlement made by his Father in the Year 1692, when he purchased those Lands as far as it crosses the Limitations in the first Settlement is entirely void, being voluntary; so that the Settlement made by the Defendant, in the Year 1698, upon his Marriage, is good, and such of the Lands which are not contained in that Settlement, the Defendant may sell, and the Plaintiff hath no Right to contest the Sale, even For the Defendant.

of those Lands, he being no Ways within the Consideration of that Settlement.

For the Plaintiff. On the other Side it was insisted for the Plaintiff, that this Settlement made by the Father, in the Year 1692, of the new purchased Lands, appears on the very Face of it to be made in Consideration of the Settlement made by him in the Year 1673, which, tho' mentioned to be by Articles, yet strictly speaking, those Articles amounted to a Covenant to stand seised; and the Settlement made in 1692, being in Execution of that Covenant, and acquiesced under ever since it was made, must now be taken as a full and entire Execution of that Covenant; and tho' the Father could not be compelled by a Court of Equity to make the Defendant Tenant for Life, who by the first Settlement was Tenant in Tail; yet the Father having of his own Accord, and with the Consent of the Trustees made this Settlement; and no Objection made to it during his Life, the Defendant shall not be admitted to say, 'tis not good, it not corresponding with the Proviso in the first Settlement.

This is not like the Case of Wakely *versus* Wakely, where the Father, on his Intermarriage, &c. articled to convey his Estate to the Use of himself and his Wife for Life, Remainder to the Heirs of their two Bodies, and afterwards he had Issue a Son, who coming of Age, the Father by his Last Will, which he mentioned to be in Execution of the Articles, devised the Estate to his Son for Life, Remainder to his first and every other Son, &c. in Tail Male, with several Remainders over, and afterwards the Son brought his Bill in this Court to be relieved against this Devise, it not corresponding with the Articles; and the Court declared, that tho' by the Equity of the Articles the Son should be Tenant in Tail; and if he had sued in this Court to compel the Father to an Execution of the said Articles, the Court would have decreed an Estate-tail to him; yet, if the Father, by the Consent and Approbation of the Trustees had made such a Settlement, this Court would never set it aside.

But in that Case the Father had done it by his Last Will, without the Consent of the Trustees, and without the Consent of the Son, who was then of Age; and by that Means the Son having no Power to make a Jointure, or any Charge on the Lands to make Provision for younger Children, that Devise was set aside.

But in the principal Case, the Settlement in 1692, was made by the Consent of the Trustees in the first Settlement,

which is therefore good, and a full Execution of the Covenant in that Settlement.

And so is Matthews's Case, who by his Father's Marriage-Articles, was made Tenant in Tail; but sometime afterwards the Father made a Settlement by which Matthews was made Tenant for Life, with a Power to settle a Jointure of 600 l. a Year on any Woman he should marry; and being about to marry, it was the Opinion of several eminent Lawyers he could make no greater Jointure; for tho' he was Tenant in Tail by the Articles, and if it rested there, he might have made what Jointure he thought fit; yet being Tenant for Life by a subsequent Settlement varying from the Articles, he could not make the Jointure beyond 600 l. per ann. and thereupon he applyed to the Parliament, and obtained an Act to make up the Jointure 1000 l. per annum, but that his Estate in Possession, and all the Remainders over should continue as before.

Next the Counsel for the Plaintiff cited the Case of Burton *versus* Hastings in this Court, which was thus, (viz.) By the Marriage-Articles the Wife's Estate was to be settled on the Husband and Wife, and on the Heirs of their two Bodies to be begotten; and afterwards it was settled to the Use of the Husband and Wife during their Lives, Remainder to the first, and every other Son of the Husband in Tail Male, Remainder to the Heirs of the Body of the Wife; they had no Son, and but one Daughter, the Husband died, and his Widow married again, and then the Husband and Wife joined in a Fine, and settled the Estate to other Uses; thereupon the Daughter exhibited her Bill, and prayed Relief on the Articles, because by the Equity thereof, the Husband and Wife ought to be but Tenants for Life, and the subsequent Settlement could not enlarge the Estate of the Wife to an Estate-Tail general, (viz.) To her and the Heirs of her Body; but she had no Relief, the Lord Chancellor Cowper declaring he could not relieve against the Settlement, though if it rested on the Articles without any Settlement made, he would have decreed, that the Articles should be carried into Execution.

It was farther insisted for the Plaintiff, that he was proper in this Application, and had Reason to pray the Aid of this Court; and for that Purpose a Case was cited between Sir Richard Mead and the Lord Kerry, which was thus, (viz.) The late Lord Kerry, in Consideration of a Marriage and a Marriage-Portion, settled his Estate to the Use of himself for Life, then to Trustees to preserve contingent Re-

mainders, then to his first and every other Son in Tail Male, &c. and before he had any Issue, he borrowed Money of the Plaintiff, and for securing the Repayment thereof with Interest, he levied a Fine, &c. And upon a special Verdict found in the Cause, the Question was, if the Charge was good against the present Lord, for that on his Father's Levying the Fine, the Trustees did not enter to preserve the contingent Remainders; so that 'tis very proper that the Plaintiff in the principal Case should come into this Court to compel the Trustees to enter, in order to preserve the contingent Remainders, especially since the Plaintiff is a Purchaser under the Settlement made Anno 1692. for that his Father who made that Settlement, had thereby abridged his Power of charging the Estate with 1000 l. per ann. which by the Settlement made Anno 1673. he had Power to do.

Curia. Every Remainder Man hath a Right to come into this Court, and pray the Aid thereof to compel Persons to bring in the Deeds and Evidences relating to the Estate; but this is a Bill of the first Impression as to the Prayer for the Trustees to enter to preserve contingent Remainders, for their Title is meerly at Law; neither doth it appear in the Cause, that the Trustees refused to enter.

Now if this Case is considered upon the Deed made Anno 1673. the Defendant is Tenant in Tail of the Lands thereby settled; but the Deed made 1692. of the new purchased Lands was intended to be a Family Settlement, and a full Execution of the Covenant in the Deed made 1673. by which Deed the Defendant being made Tenant for Life, he shall not be at Liberty to incumber any Part of the Lands thereby settled by his Father; therefore the Decree was for the Plaintiff.

And in pronouncing this Decree, the Lord Chancellor said, that where a Settlement is made by the Father, or other lineal Ancestor, in Consideration of the Marriage of his Son, in such Case all the Remainders limited to his Children and their Posterity are within the Consideration of that Settlement, but when 'tis made by a Brother or any other collateral Ancester on his Intermarriage, there after the Limitations to his own Issue, all the Remainders limited to his collateral Kindred are voluntary, and not within the Consideration of the Marriage-Settlement.

Southwell *verſus* Lord Limrick.

Depoſitions taken *de Bene eſſe*, and before the Defendant had put in his Anſwer, or Iſſue joined.

THIS was a Bill to redeem a Mortgage made Anno 1636. and upon a Motion for Publication of the Depoſitions, the Queſtion was, Whether a Depoſition taken de Bene eſſe on a Commiſſion formerly iſſued to examine Witneſſes, and taken before the Defendant had anſwered, or Iſſue joined in that Cauſe, ſhould be now read at the Hearing of this Cauſe, and according to the Reſolution in * Brown's Caſe it ought not.

* Hardres 315.

The Caſe was thus, If. Upon a Bill in the Exchequer to preſerve the Teſtimony of Witneſſes, one T. S. being a Witneſs, and ſick, was upon Hearing of Counſel on both Sides, and by Order of Court, examined de Bene eſſe on the Part of the Defendant; afterwards on the 28th of November, the Anſwer came in, and the Witneſs died on the 18th of December following, and by the Opinion of all the Judges, it was held, that his Depoſition could not be read in Evidence at a Trial in Law, in Ejectment, becauſe it was taken before Iſſue joined, and he lived long enough after the Anſwer came in to be examined in chief.

Where there is no Default in the Defendant, a Depoſition taken de Bene eſſe on Behalf of the Plaintiff, and the Witneſs dying ſoon after ſuch Depoſition taken, it ſhall not be read; but in the principal Caſe that Reaſon fails, for the Plaintiff was kept out of the Anſwer by the Defendant, for above two Years by Privilege of Parliament, and other Delays; and the Commiſſion to examine in Chief was taken out in July laſt, and by Affidavits made in this Cauſe, it appears, that this Witneſs who was examined de Bene eſſe was on the 15th Day of June (before the ſuing out any Commiſſion) ſtruck blind, and loſt the Uſe of her Memory, and ſoon after died; but if ſhe had lived, ſhe could not have been examined for the Reaſon before-mentioned; therefore as this Delay was occaſioned by the Defendant, it was inſiſted, that this Depoſition taken de Bene eſſe might be read at the Hearing this Cauſe, and publiſhed with the reſt of the Depoſitions. For the Defendant.

It was ſaid on the other Side, and admitted to be true, that where the Delay is made by a Defendant, ſo that a Witneſs cannot be examined in chief, he either loſing his Memory, or dying before he can be examined in chief; in ſuch Caſe,

Case his Depositions taken de Bene esse may be read; but if the Delay is on both Sides, they shall never be read against the Defendant, because he loses the Benefit of cross examining the Witnesses.

Now in this Case there was a greater Delay made by the Plaintiff, than by the Defendant, for the Bill was filed against him, whilst he was in Italy and Spain, in his Travels, and as soon as he returned in December, &c. he put in his Answer, which was filed 10 February following; and from that Time to the 28th of April, which is about 8 Weeks, the Plaintiff did not think fit to reply; but as soon as his Replication came in, the Defendant rejoined, and on the second of June, gave Commissioners Names to the Clerk of the other Side; but the Plaintiff did not join in Commission till the 28th Day of the same Month, so that the greatest Delay was on his Side.

So where the Mother was examined de Bene esse, and lived 8 Months after, in which Time she might have been examined in chief, but she died without being examined, it was held, that her Depositions de Bene esse should not be read in Evidence.

At the same Time it was moved, that the Publication of Depositions in perpetuam Rei memoriam might pass, and they might be read on the Hearing this Cause, the Witnesses being since dead.

Curia. 'Tis the Work of another Day, to determine whether those Depositions may be read in Evidence or not; therefore no Opinion was given as to that Matter, but it was ordered that Publication should pass, and that if the Plaintiff thought fit, he might make this Objection in proper Time.

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Term. Paſchæ,

11 Georgii. In Cancellaria.

Morgan *verſus* Dillon, *before the Lord Chancellor* Weſt *in* Ireland.

UPON a Petition to have the three Children of Sir Arthur Shean, removed from the Defendant Dillon, and to be delivered to the Plaintiff, or to ſome other Perſon whom the Court ſhould appoint; the Caſe was thus:

ff. Sir Arthur Shean being ſeiſed of a conſiderable real Eſtate, and being likewiſe poſſeſſed of a great perſonal Eſtate, married the Plaintiff Morgan's Daughter, by whom he had Iſſue three Children; and being advanced in Years, and his Wife a young Woman, he deviſed his real Eſtate to his three Daughters, and their Heirs, and by his Will appointed his Wife to be their Guardian; and he deviſed 100 l. per Annum to each of them during their Infancy, for their Maintenance; and two Parts of all his perſonal Eſtate to his ſaid three Children, and the third Part to his Wife.

The Husband deviſed his real Eſtate to his three Daughters and their Heirs, and then by a Codicil he deviſed it to his Wife, if his three Children ſhould die without Iſſue, and made her Guardian to his Children, and died; ſhe married again; the Guardianſhip was taken from her by the Court.

About three Hours before his Death, the ſaid Sir Arthur Shean made a Codicil by which he confirmed his Will, but deviſed his real Eſtate over to his Wife, in Caſe his three Children ſhould die without Iſſue of their Bodies, and ſoon after died; and about ſix Months after his Death his Widow married the Defendant Dillon.

In the Argument of this Caſe there were two Points very well debated, which, tho' in Ireland, yet ſeem very uſeful to explain the Law concerning Guardians.

(1.) Whe-

(1.) Whether this Lady, who was a teſtamentary Guardian, was removable by the Lord Chancellor.

(2.) Whether her Marriage with the Defendant Dillon is ſuch an Act which will amount to a Breach of that Truſt repoſed in her by the Teſtator; ſo as to render her incapable of ſuch Truſt, and to be removed by this Court on Account of the Marriage, and the Remainder limited to her in Fee on the Death of the three Children, without Iſſue.

For the Plaintiff.

(1.) As to the firſt Point, it was argued for the Plaintiff, that this Lady being to enjoy the Eſtate on the Death of theſe Children, without Iſſue, it would be dangerous to continue her in the Guardianſhip, eſpecially ſince ſhe is married to a young Gentleman, who, in her Right will be Guardian to them; and whoſe Children by her will be entitled to inherit this Remainder; therefore 'tis certainly in the Power of this Court to remove a teſtamentary Guardian in Caſes of ſuch unforeſeen Accidents.

1 Dom. 270.

The Civil Law (which the Teſtator underſtood very well) ought to be the Rule in this Caſe; now, by that Law, if the Mother of Infants marry a ſecond Husband, the Education of her Children may be taken from her.

For the Defendant.

* 12 Car. 2. cap. 24.

It was argued for the Defendant, that this Lady being a teſtamentary Guardian, according to * the Statute 12 *Car.* 2. by which 'tis enacted, That the Parent of a Child under Age, and not married, may by Deed or Will diſpoſe the Cuſtody of ſuch Child, for and during ſuch Time as the Child ſhall remain an Infant, or for any leſſer Time to any Perſon, other than a Popiſh Recuſant; and that ſuch Diſpoſition ſhall be good againſt any Perſon claiming the Cuſtody of the Child as Guardian in Socage, or otherwiſe; and that the Perſon to whom 'tis diſpoſed may maintain an Action of Raviſhment of Ward or Treſpaſs, againſt any other who ſhall wrongfully take away or detain ſuch Child, for the Recovery of the Child, and ſhall recover Damages for the Uſe of the Child.

And the Perſon to whom 'tis diſpoſed ſhall, and may take into his Cuſtody, the Profits of all the Infants Lands, and the Management of his perſonal Eſtate till his Age of twenty-one Years, or any leſſer Time, according to ſuch Diſpoſition, and may bring Actions in Relation thereunto, as by Law a Guardian in common Socage might do.

That this Court could not remove ſuch Guardian, unleſs guilty of ſome Miſdemeanor, which might render her incapable

pable of performing the Truſt repoſed in her; and as to the Objection, that her ſecond Marriage will make her incapable, 'tis probable it may be ſo by the Civil Law, which will not hold in this Caſe, becauſe this Lady was appointed Guardian by the Will of the Father of theſe Children, and by Virtue of a Statute which gave him Power ſo to do; and the Teſtator, at the Time of Making his Will, ſaw all the Inconveniencies which are now ſuggeſted in Behalf of the Plaintiff; for he muſt neceſſarily preſume this Guardian being very young, would marry again; nor can the Preſumptions of ill Nature, or deſtroying the Infants be applied to a Mother, as they might to another, who is next of Kin, becauſe it muſt be preſumed, that whatever Parents can get will be for the Benefit of their own Children.

Now, ſince the Teſtator hath by this Appointment in his Will, adjudged the Mother to be a proper Perſon to be intruſted with the Education of her own Children, a Court of Equity will not break thro' ſuch a Will, for that would be to make a new Will after the Death of the Teſtator.

It would likewiſe be a Breaking thro' that Power which the Subject hath purchaſed at a great Rate, and that is by ſettling a perpetual Revenue of Tonnage and Poundage on the Crown, in Conſideration of Taking away the Court of Wards and Liveries, and turning all the old Tenures into free and common Socage, and to prevent Diſputes which might be made, by diſpoſing by Will, or otherwiſe, Lands held in Knights-Service, giving Men Power to diſpoſe the Cuſtody of their Children, during their Minority, which is a Privilege that cannot be taken from them ſince the Making that Statute, which is plainly implied by the Words of the Statute it ſelf; for Power given to Parents to diſpoſe their Children to any Perſon, except to Popiſh Recuſants, is an Implication, that any other Perſon who is appointed to be Guardian by Virtue of this Statute, cannot be removed by this Court.

'Tis true, where there is a Guardian by the Common Law, a Court of Equity may interpoſe; but where by the Statute, it cannot; as for Inſtance; the Teſtator deviſed the Guardianſhip of his Son to his Mother-in-Law, and died; afterwards the Widow married a Servant, and being poor, the Uncle of the Child got the Poſſeſſion of the Infant, and ſent him beyond Sea; but the Court ordered him to reſtore the Child to the Guardian, for that they could neither remove the Child or the Guardian, but would make her give Secu-

3 Salk. 177. *See* 2 Caſes in Chancery 237.

city not to marry the Infant, without firſt acquainting the Court.

Bedell *verſus* Conſtable. Vaugh. 180.

And as a Guardian is not removable, ſo the Guardianſhip is not aſſignable, neither ſhall it go to the Executor or Adminiſtrator of the Guardian, becauſe 'tis a perſonal Truſt repoſed in him, and therefore not to be determined, but by his Death.

(2.) As to the ſecond Point it was argued, that the Marriage of this Guardian did not make her incapable of the Guardianſhip, becauſe (as it hath been already obſerved) it is a perſonal Truſt repoſed in her, and the Marriage cannot be an Aſſignment thereof, becauſe it runs in perſonal Privity; and therefore it cannot be forfeited by the Attainder or other Misdemeanor of the Husband; 'tis like the Caſe where a Feme Sole was made Truſtee, or where ſhe hath Goods as Executrix or Adminiſtratrix, her Marriage is no Reaſon to remove her from ſuch Truſt or Executorſhip.

Now, if the Deviſe of the Guardianſhip to this Lady ſhould be void, the Maintenance deviſed to her Children would likewiſe be void, and then ſhe would be Guardian to theſe Children by Nature, and certainly her Marriage, without ſome other Default, would not have determined ſuch Guardianſhip; and there cannot be any convincing Reaſon why it ſhould be determined by her Marriage, now ſhe is a teſtamentary Guardian, than it would have been if ſhe had been a Guardian at Common Law; for the Deviſe of the Remainder in Fee to her cannot be any Objection upon this Statute; for at Common Law, the Lord as Guardian in Chivalry, would have the Wardſhip of the Body and the Lands; tho' if the Ward had died without Heirs, he was to have his Lands by Eſcheat, in which Caſe it cannot be denied but the Lord was to have ſome Benefit by the Death of the Ward, as the Guardian is to have in the principal Caſe, if her Children ſhould all die without Iſſue.

The Limitation of ſuch a Remainder to a Guardian would have been no Objection at Common Law to remove her from the Guardianſhip, for if it ſhould, it muſt ariſe from a Preſumption, that the Guardian may deſtroy the Child; but in this Caſe neither the Teſtator, nor any other Perſon could, or can preſume that the Mother would deſtroy her own Children; but any Man might imagine ſhe would marry again, being young and in the Prime of her Youth.

Now, the Reaſon of Removing a Guardian at Common Law is, becauſe the Guardianſhip might be caſt on one who is

worth nothing, or on an Ideot or Madman; and therefore it was reaſonable that this Court ſhould interpoſe and grant Relief to the Infant by appointing a Guardian who might educate him ſuitable to his Degree and Quality; and this Statute was intended to remedy thoſe Inconveniencies by giving the Parents Power to aſcertain the Perſon, and to appoint ſuch a Perſon to be Guardian to their Children in whom they could beſt repoſe that Truſt, which Appointment is not like a bare Power, but 'tis coupled with the greateſt Intereſt which a Parent hath in his Children; therefore ſuch a Guardian is not to be removed by this Court.

There are two Points in this Caſe. Curia.

(1.) Whether this Court can remove a teſtamentary Guardian.

(2.) As this Caſe is circumſtanced, Whether there is a ſufficient Foundation for this Court to remove thoſe Children from the Cuſtody of the Defendants, if they are removeable at all.

At Common Law before the Statute 32 H. 8. by which the Court of Wards and Liveries was erected, the Lord Chancellor was the ſole Judge of Wardſhips, but with this Difference, that where they were lucrative to the Crown, there the Lord Treaſurer acted, who had a concurrent Juriſdiction with the Chancellor; but where Wardſhips were not lucrative to the Crown, but only for the Benefit of the Ward, there the Chancellor alone had the Diſpoſition and Management of the Ward; therefore as the Law now ſtands, the Onera feudorum being extinct, and the Court of Wards aboliſhed, and all the old Tenures being turned into free and common Soccage, all Wardſhips which are beneficial for the Wards muſt return to this Court, as to their original Fountain. 32 H. 8. cap. 46. Caſes in Chan. 3 Part 136.

'Tis true, there were ſome Statutes which altered the Common Law as to the Perſons of Wards; as for Inſtance; a Guardian in Socage, or in Chivalry, had the Cuſtody of the Perſon at Common Law; but by the Statute of * Ed. 6. it appears, that the Father of any Maid or Woman-Child unmarried, and within the Age of ſixteen, might by his laſt Will and Teſtament, or by any other Act in his Lifetime, appoint, aſſign, bequeath, give, or grant the Order, Keeping, Education, or Government of ſuch Maid, or Woman-Child, but not of the Males, probably, becauſe the Females are more expoſed to Contingencies than the other. * 4 & 5 E. 6. cap. 8.

That Statute related only to the Perſons of Infants, but the Statute of † Wills relates to their Lands; for whereas before that Statute a Guardian in Socage had the Cuſtody both of the Perſon and Lands of the Ward; now by that Statute, the Father had Power by his laſt Will and Teſtament, or by any Act lawfully executed in his Life-time, to diſpoſe all his Lands held in Socage at his Free Will and Pleaſure.

† 32 H. 8. cap. 1.

And by Virtue of that Act, Fathers did uſually deviſe their Socage Lands by Will to ſome Perſons in Truſt, for the Heir during his Infancy; and by this Means the Guardian in Socage perceiving there was no Benefit to be had by the Guardianſhip very often declined it; ſo that the Heir was without any Guardian, which being a very great Inconvenience was intended to be remedied by the aforeſaid Statute 12 Car. 2. which gave the Father a Power either by Deed, or Will, to appoint a Guardian; but this was only as to the Modus habendi, for it gave the Guardian (thus appointed) no new Authority, which he had not before; it doth not deſcribe his Power, but explain its Prevalency againſt Guardians in Socage, who were the next of Kin, to whom the Inheritance could not deſcend, and who claimed the Guardianſhip before this Statute was made.

2 Lev. 162. Biſhop of Carliſle *ver.* Wells.

The Spiritual Court might appoint a Guardian to an Infant, who had only a perſonal Eſtate, but where he hath ſuch an Eſtate, and alſo Lands, ſuch an Appointment is void; this Court might likewiſe appoint a Guardian, where there was not a rightful one before, and even where there was a Real, as well as a Perſonal Eſtate; and could remove ſuch Guardian, though made by the Appointment of this Court, if he afterwards became not fit or improper to be a Guardian; but a rightful Guardian was not removeable ad libitum, as Guardians appointed by this Court, or by the Spiritual Court might.

A Statute Guardian may be likewiſe removed for a juſt Cauſe, and for this there is a plain Authority in Sid. 424. which was but nine Years after the Making the Statute; and contemporary Expoſitions have been always thought the beſt Method of explaining the Meaning of Statutes; now in that Caſe, it was held, that a Statute Guardian might be removed, which ſhews, that it hath been admitted even in a Court of Common Law, that a teſtamentary Guardian is under the Control and Inſpection of a Court of Equity, as Superintendent of all Guardianſhips; and in the Caſe of Foſter *verſus* Denny,

2 Chan. Caſes 237.

Denny, this Court ordered a Guardian to give Bail; and if ſuch an Order is good, it may compel him to do any other Act which may be thought neceſſary for the Benefit of the Infant.

At Common Law there were four Sorts of Guardians, and every one of them removeable, (1.) There was a Guardian by Nature, and this was the Father who is the Root out of which all other Guardians ſpring; and there are Inſtances, where the * Father hath been removed from the Guardianſhip of his Child, or hath been compelled to give Security for the Benefit of the Infant; and if ſo, then certainly a derivative Guardian may be removed, for he can have no greater Privilege or Immunity than a primitive and original Guardian from whom he is derived. * Hardres 96.

And even a Guardian in Chivalry, who at Common Law had the Wardſhip both of the Body and Lands of the Ward, might be removed by this Court for any Misbehaviour or ill Uſage of the Perſon of the Ward, becauſe a Guardian never had any Intereſt in the Body of an Infant, but for the Benefit of ſuch Infant; and whenever he miſuſed that Intereſt, this Court could remove the Perſon out of his Cuſtody; 'tis true as far as ſuch Wardſhips were lucrative, the Guardians as they had an Intereſt by the Law, did enjoy the ſame without the Interpoſition of this Court.

There was likewiſe at Common Law a Guardian in Socage, which was purely for the Benefit of the Infant, and accountable to him, and removeable by this Court upon any Misbehaviour, or obliged to give ſuch Security to account as the Court thought proper; there was alſo a Guardian by Nurture, and this was the Mother, and ſhe was removeable as the Father, and for the ſame Cauſe, and ſo was a teſtamentary Guardian.

The next Queſtion may be, Whether there are Grounds in the preſent Caſe to remove this teſtamentary Guardian.

Now as to that Matter, it hath been rightly obſerved at the Bar, that this Petition is brought quia timent; but in this Caſe, as well as at Common Law, there is a Difference between a Wardſhip as it works upon the Perſon of the Ward, and as it works on his Eſtate; for that which operates on the Perſon, muſt be helped by anticipating the Evil, and in ſuch Caſe a Remedy is to be ſought quia timent; for there can be no Reparation ex poſt facto, but as it operates on the Eſtates of the Wards, a Reparation may be made, and an Application is proper in this Court ex poſt facto; nay, that is the only Time for that Purpoſe; as for Inſtance;

The

* Lecone ver. Shiers Vernon 442.

The * Father of an Infant being indebted to the Defendant, granted the Guardianſhip of his Children to him (the Defendant) with a Covenant in the Deed not to revoke it; the Bill was to bring the Guardian to Account, and to remove him; but becauſe there was a juſt Debt due from the Father to the Guardian, the Court would not reſtrain him from receiving the Rents of the Infant's Eſtate, but only from abuſing his Perſon.

Now, if this Court can interpoſe in any Caſe, where there is a teſtamentary Guardian, why not in this, if 'tis thought neceſſary ſo to do? The Propoſition is general; either a Guardian can, or cannot be removed at all; that he cannot is falſe, if he can in any one Caſe; and that it can in ſome Caſes hath been already proved by the Authorities cited; therefore it may be done in this Caſe.

'Tis true, here is a Remainder limited to the Mother, and it muſt be admitted, that at Common Law this was a good Objection to remove a Guardian in Socage, upon a Preſumption, that ſuch a Guardian who was the next of Kin might deſtroy the Ward; but ſuch a Preſumption could never prevail in the Caſe where a Parent was Guardian; for it would be a monſtrous Preſumption, that a Man ſhould deſtroy his own Child to inherit his Eſtate; neither can the Want of good Nature be preſumed in this Lady towards her own Children, ſo as for any Man to imagine ſhe could be guilty of ſuch an Act.

But ſhe is married, and under the Control of her Husband who in her Right will be Guardian, and his Children by her will inherit thoſe Lands, if the Children by her firſt Husband ſhould die without Iſſue; and how can the Mother ſhew her Affection or good Nature to thoſe Children who hath nothing for them, but what is under the Power and Control of her Husband, and who in Reality is Guardian, which certainly is going out of the Will, and what the Teſtator never intended.

Therefore it was decreed, that thoſe Children ſhould be removed from the Mother their Guardian, and that the Court would appoint ſome proper Perſon amongſt their Relations to receive them; but that the Mother ſhould be at Liberty to ſee them as often as ſhe would, and as to the Guardianſhip of the Lands, there was no Decree made, becauſe there was another Bill depending as to that Matter; but the Chancellor declared, that a Perſon bred to Hardſhip and Penury, and who afterwards makes his own Fortune, and keeps it, is more likely to deal fairly with Infants, than one born to an Eſtate, and who becomes neceſſitous by ſquandring it away;

for ſuch Perſons rarely retrieve their Fortunes, but are always neceſſitous.

Webber *verſus The* Earl of Montrath.

TEnant in Tail (Remainder in Tail to the Defendant) made a Leaſe for ninety-nine Years, determinable on three Lives, with a Covenant that the Leſſee ſhould renew, &c. and afterwards he mortgaged the Lands to T. S. in Fee, who aſſigned the Mortgage to one Flower.

If there was no legal Tenant to the *Præcipe*, in order to ſuffer a Common Recovery; yet after Length of Time it ſhall be preſumed, that there was a legal Tenant.

Afterwards the Leaſe for Lives (which was prior to the Mortgage) being determined, the ſaid Tenant in Tail made a new Leaſe to the now Plaintiff, purſuant to the Covenant in the firſt Leaſe, and then he and the Aſſignee of the Mortgagee joined in a Conveyance of the Equity of Redemption to one Alcock, in order to make him a Tenant to the Præcipe; and thereupon a Common Recovery was ſuffered, in which the Tenant in Tail was vouched, and he vouched over the common Vouchee, and ſoon after died without Iſſue.

Then the Defendant, the Earl of Montrath, got this Mortgage to be aſſigned to one Geering, in Truſt for himſelf, and brought an Ejectment on a double Demiſe by him and the ſaid Geering; and thereupon the Plaintiff exhibited this Bill to ſtay the Proceedings at Law, and having got an Injunction, a Motion was made to diſſolve it upon Coming in of the Anſwer; but the Counſel for the Plaintiff inſiſted, that it might be continued on the Equity confeſſed in the Anſwer, it appearing that the Aſſignee of the Mortgagee did join with the Tenant in Tail in the Conveyance to Alcock, to make him a legal Tenant to the Præcipe; and tho' it was objected, that this Remainder to the Defendant could not be barred, becauſe there was no legal Tenant to the Præcipe; yet it was inſiſted for the Plaintiff, that this Recovery being ſuffered in the Year 1702, which was now more than twenty-three Years paſt; if he could not ſhew that there was a legal Tenant to the Præcipe, it muſt be preſumed in his Favour (as a Purchaſer) that after ſuch a Length of Time there was ſuch a legal Tenant.

And if this may be preſumed, then the Mortgagee, who is a Truſtee for the Mortgagor, and he joining with the * Ceſtui que Truſt in ſuffering this Recovery, it ſhall be a Bar to all the Remainders; and this is proved by the Caſes cited in the Margin, where it was held, that a † Recovery ſuffered by

* The Mortgagor.

† 2 Chanc. Rep. 78. Vern. 13, 226, 440.

by Ceſtui que Truſt in Tail barred the Intail and all the Remainders, and that ſuch a Recovery ſhall have the ſame Effect in a Court of Equity, and bind the Truſt in the ſame Manner as it would the Eſtate in Law, in Caſe he had the legal Eſtate in him; and as to a Fine it had never been doubted of late; and that even a Bargain and Sale enrolled by Ceſtui que Truſt of an Eſtate-tail ſhould bind the Iſſue, becauſe ſuch Truſt is not within the Statute de Donis.

Econtra for the Defendant.

The Counſel for the Defendant inſiſted, that the Plaintiff ought to give a Judgment at Law, with a Releaſe of Errors, otherwiſe the Injunction ought not to be continued, for that the Defendant being Tenant in Tail, it would be of ſome Advantage to him to have the legal Eſtate; ſo as he might dock the Intail, and avoid all the Remainders over; and then the Plaintiff may have the Benefit of his Title in Equity, and make the moſt of it.

Curia.

None of the Caſes cited at the Bar come up to the preſent Caſe, for in all thoſe Caſes the Truſt covered the whole Eſtate of the Ceſtui que Truſt, as well as of thoſe in Remainder; 'tis true, the Caſe of * Basket and Peirce is ſomewhat like it, which was thus: ſ. The Teſtator deviſed his Lands to Truſtees for ninety-nine Years for the Payment of his Debts; and if they did not act, then he deviſed the Lands to T. S. and his Heirs in Truſt to pay his Debts, and afterwards to A. B. in Tail, Remainder in Tail to E. G. Afterwards A. B. who was the Ceſtui que Truſt in Tail, levied a Fine, and died without Iſſue, and five Years paſſed without any Claim; it was decreed, that this Fine and Nonclaim barred the Remainder-Man in Tail, for equitable Rights are bound by Fines as well as Actions and Titles at Law; and tho' it was inſiſted for the Plaintiff in that Caſe, that the Title of the Remainder-Man was not yet commenced, becauſe the Debts were not paid, and the Term for ninety-nine Years was ſubſiſting; and that the entire Eſtate at Law being in the Truſtee, he ought to have entered; and that it was againſt Equity for him to ſuffer the Ceſtui que Truſt to be barred by a Fine and Nonclaim thro' his Default; yet the Court was ſtill of Opinion, that the Plaintiff was barred.

* Vern. 226.

'Tis true, in the principal Caſe the Mortgagee in Fee was a Truſtee for the Mortgagor, but he is only ſo far a Truſtee as he derives under the Title of the Mortgagor, and hath no Relation to the Remainder over; and to ſay that the Remainder of a legal Eſtate ſhall be barred by a Recovery ſuffered by a Ceſtui que Truſt of a particular Eſtate is going far-

ther than ever that Point hath been carried; and ſeems to croſs the Intention of the Statute de Donis, for by that Statute this Remainder is veſted.

Beſides, this Recovery was ſuffered by a Ceſtui que Truſt in Tail, which is but a particular Eſtate, who at that very Time had it in his Power to have the legal Eſtate, by paying off the Mortgage.

It hath been objected, that there was no good Tenant to the Præcipe; but if there had not, it ought to be preſumed that there was a good one after this Length of Time.

'Tis true, it induces a ſtrong Suſpicion, that the Defendant, who is the Remainder-Man, thought himſelf barred by this Recovery when he brought the Ejectment, and declared on a double Demiſe, the one made by himſelf, and the other by the Aſſignee of the Mortgagee, which Titles cannot ſtand together; for if his Remainder is good, his Title under the Mortgage is not; and 'tis plain, that the Plaintiff hath a Right to be relieved againſt any Right the Defendant can claim under the Mortgage; therefore as to that a perpetual Injunction was decreed for the Plaintiff; but as to the Defendant's Title under the Remainder, a Trial at Law was directed, and after the Trial an Injunction was ordered till the Hearing this Cauſe.

DE

Term. Sanct. Trin.

11 Georgii. In Cancellaria.

Winter *verſus* Bermingham.

THE Caſe, *ſſ.* Peter Brown being poſſeſſed of Lands for a long Term, which he enjoyed twenty-ſeven Years, by his Laſt Will declared, that this Term was taken by him in Truſt for the Defendant Bermingham, to whom he deviſed the Remainder thereof unexpired, and declared that it was in Purſuance of the ſaid Truſt, and ſoon afterwards died.

Thereupon the Plaintiff exhibited a Bill in this Court, ſuggeſting, that both the Teſtator and the Defendant Bermingham were Papiſts, and conſequently by the Statute made againſt the Growth of Popery, were incapable to take this Term; and therefore he being the next Proteſtant Heir, prayed that the Reſidue of the Term might be aſſigned to him.

And in arguing this Caſe, it appearing that the Teſtator, Peter Brown, had enjoyed theſe Lands for twenty-ſeven Years, and until the Time of his Death, the Court would not intend this to be a Truſt, and therefore decreed for the Plaintiff, with an Account of the Profits ſince the Filing the Bill.

But it was inſiſted for him, that the Account of the Profits ſhould be from the Time this will took Effect, as it was reſolved in the Houſe of Lords between Blake and Blake, (viz.) That a Papiſt muſt be accountable for the Profits ſince the Time of the original Purchaſe.

Sed per Curiam; That Decree was made upon ſome extraordinary Circumſtances, but that the preſent Decree ſhould be according to the Precedents in this Court; and denied to give the Plaintiff Coſts, for that it was Hardſhip enough for him to loſe the Lands.

Lords Commiſſioners *Raymond* and *Gilbert*.

Boothby *verſus* Vernon.

Where a Man ſhall be Tenant by the Curteſy of *England*, or not.

UPON a Bill in Chancery to ſet aſide a Conveyance which was obtained by Fraud, and for a Reconveyance of the Eſtate, the Caſe was:

Sir Henry Boothby by his laſt Will, deviſed the Lands in Queſtion to his Siſter * *Anne Boothby* for her Life, and that if ſhe married and had Iſſue Male of her Body living at the Time of her Death, then to ſuch Iſſue Male, and to his Heirs Males for ever; but if ſhe died, leaving no Iſſue Male at the Time of her Death, then to *Gore Boothby* and his Heirs for ever.

* She was his Heir at Law.

Sir Henry Boothby ſoon after making this Will, died, and the ſaid Anne, who was his Siſter and Heir, married with the Defendant Vernon, by whom ſhe had Iſſue a Son and a Daughter; then Anne died, and afterwards the Daughter died, and the Son ſurvived, who afterwards died, and the Plaintiff Mr. Boothby is Heir at Law, both to the ſaid Teſtator and Anne; but the Defendant and one Young an Attorney, fraudulently obtained a Conveyance of this Eſtate, which was of the Value of 700l. per ann. in Conſideration only of 50 Guineas.

Upon hearing the Cauſe before the Maſter of the Rolls, he decreed that the Defendant ſhould reconvey all his Right to the ſaid Lands to the Plaintiff, and that the Conveyance which he had thus obtained by Fraud, ſhould be cancelled and deſtroyed.

And now upon a Rehearing before the Lords Commiſſioners Raymond and Gilbert, it was inſiſted for the Defendant Mr. Vernon, that tho' he took this Conveyance, knowing it to be fraudulently obtained by his Attorney, and ſo was guilty of imputative Fraud; yet that cannot be any Ground to take away any Right from him, which he had before that

Deviſe to the Wife for Life, Remainder to the Iſſue Male of her Body, and to the Heirs Male of ſuch Iſſue Male, Remainder over;

Conveyance was executed; and a Right he had, (viz.) to be Tenant for Life by the Curteſy of England, becauſe his Wife was ſeiſed of the Inheritance during the Coverture; 'tis true, it determined by her Death; but 'tis not neceſſary the Eſtate ſhould continue after her Death, to make the Husband Tenant by the Curteſy, if ſhe was ſeiſed of the Inheritance in her Life-time, which by Poſſibility might have continued after her Death.

ſhe had Iſſue a Son, who died in her Life-time, and then ſhe died, but ſhe being Heir at Law to the Teſtator, the Reverſion in Fee deſcended on her; decreed that her Husband ſhall not be Tenant by the Curteſy.

And of ſuch an Inheritance ſhe was ſeiſed before and after the Marriage; for tho' ſhe had an expreſs Eſtate for Life given to her by this Will, yet there was no immediate Remainder which poſſibly could veſt during her Life; but the Inheritance was limited upon a contingent at her Death; and therefore ſhe being Heir at Law to the Teſtator, it muſt deſcend to her till the Contingency happen, ſo that ſhe was ſeiſed of the Inheritance ſubject to this Contingent; and tho' that Inheritance vaniſhed at her Death, yet her Husband ſhall be Tenant by the Curteſy.

But if not, yet he hath ſome other Rights to this Eſtate; as for Inſtance; his Son might take the Reverſion in Fee by Purchaſe under this Will; and if ſo, then the Heirs a parte paterna will have a Title; but if the Son took by Deſcent, 'tis otherwiſe; and 'tis probable, the Defendant may have ſome other Demands which he may juſtly make to thoſe Lands; therefore tho' this Conveyance was got by his Attorney by Fraud, and this may be a Fault in him by Imputation; yet there is no Reaſon to oblige him to reconvey all his Right to the Plaintiff.

Therefore the Fee deſcending on her, even before ſhe married, or had Iſſue, and her Eſtate for Life being not merged by the Deſcent of the Fee, her Husband ſhall be Tenant by the Curteſy, and ſo is the Caſe of * Plunkett *verſus* Holmes, and Purefoy and Rogers, and my Lord Hale was of Opinion, that the Law was ſo clear in this Point, that he would not ſuffer it to be conteſted.

* 1 Lev. 11. Sand.

So that this Decree being, that the Defendant ſhall reconvey generally without reſerving to him that Eſtate for Life, which he had by the Curteſy, for that Reaſon it ought to be reverſed.

There is another Reason likewise why it ought to be reversed, and that is, it being a Point of Law, Whether the Defendant is Tenant by the Curtesy, or not, that Point ought not to be determined in a Court of Equity without a Trial at Law.

It was insisted for the Plaintiff, that a Reconveyance was absolutely necessary, because the Plaintiff can never recover (having conveyed the legal Estate to the Defendant) until he have a Reconveyance, and 'tis not sufficient to set aside the Deed as fraudulently obtained; for if the Plaintiff should bring his Action at Law, and the Defendant should give this Deed in Evidence, it cannot be avoided by Pleading the Fraud, and giving that in Evidence, so that a Reconveyance being necessary, the Question will be what Sort of Conveyance. Econtra.

And certainly it must be a Reconveyance without reserving any Estate for Life to the Defendant as Tenant by the Curtesy; for though 'tis a Point in Law, Whether he is so or not; yet the Court who made this Decree did not determine it without referring it to the Court of Common Pleas, for the Opinion of the Judges of that Court, and they certified that he was not Tenant by the Curtesy; however, though 'tis a Point in Law, 'tis a Point incidently arising on a Cause proper for the Jurisdiction of a Court of Equity, and such Points have often been determined in this Court.

Now after a Question in Law referred to the Opinion of the Judges, is by them certified to this Court, 'tis very unusual to speak to it again upon the same Head; for if that should be allowed, it would be in vain to refer Cases in Law to the Judges for their Opinion, and to certify to this Court what the Law is.

'Tis true in the great Case of the Duke of Norfolk, the L. Chancellor Finch decreed against the Opinion of the Judges, and in the Case of Gore *versus* Gore, the L. Chancellor Macklesfield did order the Point, certified by the Judges to be spoke to again before himself, upon some Dislike of the Judges Certificate; and his Reason was, to give an Opportunity, that the Matter might be finally determined by Appeal to the House of Lords but; the Parties agreed.

Now as to the Point in Law, 'tis clear that the Wife had but an Estate for Life by this Devise, and that the Reversion in Fee descended on her; and then the Question is, if that is such an Estate in Possession, that the Husband may be

Where the Husband ſhall not be Tenant by the Curteſy.

be Tenant by the Curteſy; and it was argued, that it was not, for it muſt be executed in Poſſeſſion, otherwiſe the Husband ſhall not be Tenant by the Curteſy; as where an Eſtate is given to two Siſters and the Heirs of their Bodies, the Husband of her who dies firſt, ſhall not be Tenant by the Curteſy, becauſe the Eſtate of the ſurviving Siſter intervenes.

2 Roll. Abr. 90.

Now here the Teſtator having deviſed an expreſs Eſtate to his Siſter for Life, and limited contingent Remainders upon her Death, the Fee not being veſted in Poſſeſſion in any Body muſt remain in himſelf; as where a Feoffment is made to T. S. for Life, Remainder to the Right Heirs of W. S. in ſuch Caſe if Tenant for Life dies before W. S. he who made the Feoffment, ſhall have the Fee; and it was the conſtant Rule, that where the Reverſion came to the Tenant for Life, by the ſame Conveyance, there the Eſtate for Life was not merged; but if it came by Operation of Law as by Deſcent, or by any different Conveyance, there 'tis merged, and ſo are the Caſes of * Wood and Ingerſole, and Harriſon *verſus* Bell, &c.

2 Cro. * Vent.

Curia.

Upon the Death of the Wife, the contingent Eſtate-Tail to her Iſſue began, ſo that at that Time the Eſtate was to commence in Poſſeſſion, and be conſummate, becauſe her Eſtate for Life, by which it was to be ſuppoſed, was gone, ſo that the Inheritance being never veſted in her during her Life, for that Reaſon her Husband cannot be Tenant by the Curteſy.

And to make this more clear, the Intention of the Teſtator is to be conſidered; now it doth not appear, that he had any Manner of Intention; that his Siſter ſhould have any Benefit of the Inheritance, if he had, then certainly he having the whole Dominion over his Eſtate, and who could have molded it as he thought proper, would have ſhewed, that he intended ſhe ſhould have the Inheritance; but there is not the leaſt Sign or Badge of any ſuch Intention; and if it ſhall be otherwiſe intended by Operation of Law, that would be an Injury done to the Intention of the Teſtator.

Where-ever the Eſtate is to be determined by expreſs Limitation or Condition upon the Death of the Wife, there the Husband ſhall not be Tenant by the Curteſy; as where an Eſtate for Life is limited to a Woman, Remainder to her firſt, and every other Son in Tail Male, Remainder to the Heirs of her Body, Remainder to her

right Heirs; here 'tis plain, that she is seised of the Inheritance; yet if she hath a Son, her Husband shall not be Tenant by the Curtesy, because the contingent Estate, which is to arise upon her Death intervenes between her Estate for Life and the Inheritance.

Agreeable with the Case before-mentioned is the Year-Book 1 Ed. 3. 14, 15. which is Tenant for Life, Remainder in Fee, &c. The Tenant for Life made a Lease to him in Remainder for so many Years, as he (the Remainder-Man) should live; then Tenant for Life died and so did the Remainder-Man; it was adjudged, that his Wife should not be Tenant by the Curtesy, because the Possibility which the Tenant for Life had, that the Estate might revert to him, had barred her of all Right of Dower. 45 Ed. 3. 16.

For these Reasons the Decree was affirmed without any Allowance on Account of the Tenancy by Curtesy; and as to any other legal Interest the Defendant had, he might assign it to Trustees, but not to be given in Evidence till the Plaintiff recovers against the Defendant; and as to any equitable Demand, that may be affected by this Decree, that the Defendant shall reconvey without Prejudice to such Right.

Charles & al' *versus* Andrews.

THIS was a Bill brought against the Heir and Executors of John Andrews deceased, by the Plaintiffs, who were his Creditors on simple Contract, for an Account, and to have their Debts paid. Articles for the Sale of an Estate were decreed specifically to be performed.

The Case was thus: ſſ. The Executors of this John Andrews had paid away his personal Assets in satisfying Debts by Specialty, which were a Lien at Law on his real Estate; and by the constant Course of this Court, where such Debts are discharged out of personal Assets (as these were) in Case of the Lands, then the Creditors by simple Contract shall stand in the Places of the Creditors by Specialty, to have their Debts satisfied out of the Lands; and so it was decreed in this Case, and that the Lands should be sold for that Purpose; and the Heir, who was an Infant, to join in a Conveyance within six Months after he comes of Age.

But as to the Sale of the Lands another Question did arise, and that was, that the Widow of the said John Andrews might keep to that Jointure which was settled on her before Marriage, and relinquish her Dower, or at least be obliged

ged to chuſe one, and to relinquiſh the other, and that ſhe might not have both; for tho' the Jointure which ſhe had by her Marriage Settlement is not expreſſed to be in Bar of her Dower, yet 'tis the Rule of this Court, that ſhe ſhall not have both.

Curia. The Court was of Opinion, that if ſhe was a Party to the Settlement, and of Age at the Time of her Marriage, and 'tis expreſſed that her Jointure ſhall be in Bar of her Dower, then ſhe ſhall be barred; but if 'tis not ſo expreſſed, it ſhall never be averred to be in Bar of her Dower; and ſo is Vernon's Caſe.

And ſo was the Caſe of Lawrence and Lawrence in the Houſe of Lords, Anno 1717, where it was ſo held, tho' the Settlement was in Conſideration of a Portion in Marriage; but it did not appear the Parties intended it ſhould be in Bar of Dower, which is a different Conſideration from that of a Marriage-Portion; therefore nothing but a plain and expreſs Intention of the Parties ſhall bar the Right of Dower.

Dower is not to be barred, but by an expreſs Intention.

'Tis true, this Court hath gone ſo far as to confine a Widow to her Election which to take, where a Term for Years was ſettled on her in Jointure in Bar of her Dower, tho' no chattel Intereſt can bar her Dower at Law, or within the Statute; but in Regard ſhe expreſly conſented to accept ſuch an Intereſt for her Jointure, this Court would not admit her to have both.

Then it was inſiſted for one Atkyns, who was a Creditor by Articles made between him and the ſaid John Andrews, for the Purchaſe of Part of his Lands, that if the Creditors upon ſimple Contract ſhall now ſtand in the Places of the Creditors by Specialty, that it may be without Prejudice to his Demand, and that he might have a ſpecifick Performance of the Articles.

'Tis true, the ſaid John Andrews ſold the ſame Lands to one Cropp, but after the Articles were executed for Sale thereof to the ſaid Cropp, he gave the Vendor 700 l. for Leave to relinquiſh his Bargain, and thereupon thoſe Articles were made void; by which it appears that it was a very extravagant Bargain, for otherwiſe ſo great a Sum would not have been given to relinquiſh it; and it was inſiſted on Behalf of the Defendants, that an extravagant Bargain ought not to be carried into Execution in a Court of Equity.

Extravagant Bargain not to be carried in Execution in a Court of Equity.

To which it was anſwered, that Atkyns the Purchaſer, under theſe Articles, would likewiſe relinquiſh the ſame upon

the Payment of the 700 l. to him; for since John Andrews had got so much Money by Cropp, it was but just that Atkyns should have that Money, or a specifick Performance of his Articles; and the Court was of that Opinion; but in Regard the Defendant was a Minor, and by Consequence could make no Election,

Therefore the Court decreed a specifick Execution of the Articles made between Andrews and Atkyns, for that the Sale thereof by Virtue of those Articles, and in Consideration of so much Money to be paid for the Purchase, was a separate and specifick Lien on those Lands, and this by the constant Course of this Court, and for so much of the Purchase-Money to be paid as the Lands shall fall short to answer the said Atkyns, he shall come in as a Creditor by Specialty on the other Lands. Curia.

Therefore it was decreed, that all the Lands not settled in Jointure, or which might be in Dower to the Widow, should be forthwith sold, and that the Infant should join in the Conveyance within six Months after he should be of Age, and the Master to take an Account of all the Debts, and that the same shall be paid in Proportion; and if the Lands now to be sold shall not be sufficient to pay all the Debts, then the Reversion of the Widow's Jointure or Dower shall come in Aid thereof, to satisfy what shall remain unpaid.

Soley *versus* Salisbury.

A Bill was exhibited by the Creditors of a Mortgagor to have the Estate sold for the Payment of their Debts, pending which Suit the Mortgagee obtained a Decree to foreclose the Mortgagor of the Benefit of Redemption. Pending a Suit by the Creditors against the Mortgagor to sell, the Mortgagee got a Decree to foreclose.

The Court decreed, that the Plaintiff should redeem upon Payment of the Principal and Interest, and Costs, to the Mortgagee, and referred to a Master to take an Account thereof, and that the Land should be sold to pay the Creditors. Curia.

Adams *verſus* Clerke.

Contradictory Clauſes expounded in a Will, ſo as to make all conſiſt.

THE Caſe was, (viz.) The Teſtator deviſed ſeveral ſpecifick Legacies to ſeveral Perſons, and in particular he deviſed ſpecifick Legacies to each of his Grandchildren, to be paid at their reſpective Ages of twenty-one Years, or Days of Marriage, which ſhould firſt happen; and by a ſubſequent Clauſe in his Will, he appoints, that all the Legacies thereby deviſed ſhall be paid within one Year after his Deceaſe.

Now the Grandchildren, tho' under Age, and unmarried, exhibited their Bill, and inſiſted, that by Virtue of this laſt Clauſe in the Will, their Legacies ought to be paid within a Year after the Death of the Teſtator.

Curia. The ſubſequent Clauſe in this Will, which ſeemingly contradicts the Payment of the Legacies to the Grandchildren in Point of Time, muſt be conſtrued ſo as it may not be repugnant to any former Clauſe in the ſame Will, and therefore that laſt Clauſe muſt only relate to the other ſpecifick Legacies given to the other Legatees, and not to the Legacies deviſed to the Grandchildren.

Hill *verſus* Filkins, *and his Wife.*

Bill by a Proteſtant Heir to recover Lands deviſed by a Papiſt in Truſt.

THIS was a Bill exhibited by a Proteſtant Heir for the Recovery of Lands deviſed in Truſt for a Papiſt; the Caſe was as followeth: *ſ.* Anne Stephenſon, who was Grandmother both to the Plaintiff and to the Defendant's Wife, by her Laſt Will, Anno 1716, deviſed the Lands now in Queſtion to one Eyre and Buſh, both Papiſts, in Truſt, to be ſold for the Payment of her Debts and Legacies, and the Reſidue of the Money ariſing by ſuch Sale, ſhe deviſed to the Wife of the Defendant, when ſhe ſhould attain her Age of twenty-one Years, or be married with the Conſent of the ſaid Truſtees, and appointed them to be her Guardians, and ſoon after died.

The ſaid Guardians ſent the Plaintiff, who was then very young, to a Popiſh School in Suſſex, and the Defendant's Wife to another Popiſh School in Hammerſmith; but Roger Hill, their Father, who was their Guardian by Nature, petitioned the Lord Chancellor Cowper, to have the Guardianſhip of his Children, or ſome other Proteſtant, who ſhould be thought proper; and accordingly an Order was made, that

they ſhould be educated in ſome Proteſtant School; but before that Order could be executed, the Defendant intermarried with one Filkin, at the Chapel of the Emperor's Reſident by a Prieſt, and two Days afterwards by a Miniſter of the Church of England.

The Defendant confeſſes by her Anſwer, that ſhe was a Papiſt at the Time of making the Will, and at her Grandmother's Death, and for Plea ſaith, that the Plaintiff was then a Papiſt; and that ſhe was at that Time under the Age of eighteen Years, and that before ſhe came to that Age, ſhe intermarried with the other Defendant Filkins, who was then, and now is a Proteſtant; and that ſhe her ſelf became a Proteſtant, and conformed within ſix Months next after ſhe came to the Age of eighteen Years, according to the Statute in that Caſe made and provided: The Words of which Statute are thus:

Ff. After 29 *September* 1700. Perſons educated in, or profeſſing the Popiſh Religion, who ſhall not within ſix Months after they attain the Age of eighteen Years, take the Oaths of Allegiance and Supremacy, and make and ſubſcribe the Declaration of 30 *Car.* 2. in the Courts of Chancery, King's Bench, or Quarter-Seſſions, ſhall be diſabled (but not their Heirs or Poſterity) to inherit, or in any Wiſe to take any Lands, Tenements, or Hereditaments within this Kingdom, and during the ſaid Perſons Lives, the next of Kin, who ſhall be a Proteſtant, ſhall have and enjoy the ſaid Lands untill they take the ſaid Oaths, without accounting for the Profits received, but not to commit Waſte on Penalty of treble Damages. 11 & 12 Will. 3. c. 4. Parag. 5, 6.

The next Clauſe is, that after the 10th of *April* 1700. no Papiſt ſhall purchaſe mediately, or immediately, any Lands, Tenements, or Hereditaments within this Kingdom, or Profits out of the ſame, but all ſuch Eſtates or Profits out of Lands ſhall be void.

Then ſhe inſiſted, that the Plaintiff had no Right, he being a Papiſt himſelf at the Time of the making this Will, and at the Death of the Teſtatrix.

This being the Fact, the ſingle Queſtion was, Whether this Deviſe of the Reſidue to the Grandaughter, ſhall be accounted as Land, and a Purchaſe thereof, within the Statute; for if 'tis, then 'tis void, and the Eſtate will deſcend to the Plaintiff as Heir at Law.

And as to that Point, it was ſaid for the Plaintiff, that to deviſe Lands for Payment of Debts, and the Reſidue of the

Money, arising by the Sale thereof, to be paid to a Papist, this Residue shall be taken as Lands, and is a Purchase thereof within this Act; and therefore cannot be taken by a Papist; and so it was resolved in the House of Lords, in the Case of Roper and Ratcliffe; for otherwise since no Body else could have any Interest therein, such Papist might pay the Debts and Legacies, and enjoy the Lands, and by this Means the Statute would be eluded, which was made to prevent their taking Lands.

Econtra. The Counsel for the Defendant admitted, that a Devise of the Residue (as in this Case) was a Purchase, and within the second Clause of this Statute; but yet that the Defendant was intitled to have an Execution of this Trust, for that this Statute had two Views; one was to hinder Papists from inlarging their landed Interest; the other was to invite them to conform; and the Age of 18 was accounted a proper Period for for them to make their Election, whether they would conform, or not.

Therefore a Devise to a Papist under the Age of eighteen Years is good, if he conform within six Months after he comes to that Age; otherwise the Words in the Statute which directs when that Conformity shall be made, are in vain, and tho' he did not conform at the Time appointed; yet the Inheritance vested in him, and shall descend to his Heirs, and he shall maintain an Action of Waste by Virtue of the Statute against the next Protestant Heir, who is intitled to take the Profits during the Disability.

And though the Defendant's Wife was bred a Papist, and professed the Popish Religion, both at the Time of the Devise, and at the Death of the Testatrix, and likewise at the Time of her Marriage; yet she became a Convert before she was of the Age of eighteen Years, and had done all which is required by the Act, and so is capable to take and enjoy the Estate.

Curia. And the Court was of this Opinion; and therefore decreed the Trustees to perform the Trust.

N. B. On a Rehearing before the Lord Chancellor King, the Bill was dismist with Costs.

Barker *verſus* Eyles *and* Smith.

Joint-tenants for Life, and Tenants in Common of the Inheritance; one of them died in the Life-Time of the Teſtator.

THIS was a Bill brought by a ſurviving Legatee to have an Execution of a Truſt, in which the Caſe was as followeth:

ſſ. The Teſtator Barker deviſed his whole Eſtate to the Defendants the Truſtees, to be ſold for Payment of his Debts and Legacies, and the Money remaining to be laid out in Lands, in Truſt, and for the Uſe of the Plaintiff, and one Jerom Barker, and the Survivor and Survivors of them, his Heirs and Aſſigns, equally to be divided between them Share and Share alike.

This Will was made Anno 1716. and about 4 Years afterwards, the Teſtator died, and left a conſiderable perſonal Eſtate ſufficient to pay all his Debts and Legacies; but Jerom Barker, one of the Legatees, died in the Life-time of the Teſtator; and now the Plaintiff, as ſurviving Legatee, exhibited this Bill to have an Account of the real and perſonal Eſtate of the ſaid Teſtator.

The Truſtees by their Anſwer ſubmitted to account, and to execute the Truſt out of the Reſidue of the Eſtate, after Debts and Legacies paid.

The Queſtion was, how this Truſt ſhould be executed, for that the Heir at Law to the Teſtator claimed a Moiety of the Eſtate by Deſcent; and this depended upon the Conſtruction of this Will, what Eſtate the Legatees took by this Deviſe; for if it was a Tenancy in Common, and one of them dying in the Life-time of the Teſtator, then his Moiety will deſcend to the Heir at Law, as undiſpoſed by the Will; but if they were Joint-tenants, then the Whole ſurvives to the Plaintiff.

Tenant in Common dying in the Life-time of the Teſtator, his Moiety will deſcend to the Heir at Law.

The Counſel for the Plaintiff inſiſted, that this was a Joint-tenancy, it being in a Will where the Intention of the Teſtator is to govern, and where artificial Reaſoning is not to be admitted againſt it; and that nothing but an expreſs Intention, or a neceſſary Implication of ſuch Intention ſhall create a Tenancy in Common in a Will which would not create ſuch a Tenancy in a Deed.

Now

Now 'tis plain these Words would not make a Tenancy in Common in a * Deed; therefore if such a Tenancy is made by this Will, it must be by Implication; but express Words in the same Will shall never be rejected, to make Room for an Implication, as the Word Survivor must be in this Case, if this is a Tenancy in Common by the subsequent Words equally to be divided between them; it being first devised to them, and the Survivor and his Heirs, in express Terms.

* Dyer 25.

It may be objected, that if both the Legatees had survived the Testator, they would have been Tenants in Common; but by the Word Survivor, the Testator intended a Provision, that if either survived, he should have the Whole, and that if both survived, they should take by Moieties.

Now in this Case, the legal Estate being in the Trustees, the Heir at Law can have no Pretence, that a Moiety descends to him as undisposed; therefore by these Words in the Will the Legatees were Joint-tenants; and so it hath been resolved in parallel Cases; as for Instance; where the Testator devised Lands to Jane and Elizabeth during Life, equally to be divided, Remainder to the right Heirs of Jane; this was adjudged a Joint-tenancy, Anno 6 Annæ, between Tuckman and Jefferies.

So a Devise to two, equally to be divided between them, to have and to hold to them and the Survivor of them; this was adjudged a Joint-tenancy.

2 Roll. Abr. 90.

So a Devise to his Executors, and to the Survivor of them, was held a Joint-tenancy.

So where Lands were devised to two Daughters equally to be divided, and to the Survivor of them, and to the Heirs of the Body of such Survivor; this was adjudged a Joint-tenancy, and not a Tenancy in Common.

Style 211.

Now by the Words of this Will, the Trustees are directed to convey the Lands to the Legatees, and to the Survivor of them, and his Heirs; therefore the Heir at Law shall take nothing by Descent, this being an executory Trust, and the legal Estate vested in the Trustees.

Farther by a Devise to two and their Heirs, they are Joint-tenants; so a Devise to two without saying more, they are Joint-tenants by Implication; but in this Case, the Testator hath forbidden such an Implication by his Comment on the Devise in these Words (equally to be divided); and the Word Survivor explains his Intention to break the Descent to the Heir at Law; and is a Conveyance to carry the Estate

intirely to the Survivor; for otherwise that Word must be rejected, which could never be the Intention of the Testator; and this was the Opinion of one of the Lords Commissioners.

The Counsel for the Defendant argued, that this was a Tenancy in Common, and that the Construction of a Trust in a Court of Equity, shall be the same with a Devise of an Estate at Law; and as the Heir at Law is favoured in all Courts, if any Accident in Point of Fact should arise between the Inception and Consummation of a Will (as it did in this Case, between the Making the Will and the Death of the Testator) to favour his Right, in such Case he shall take. *Econtra* for the Heir at Law.

Now 'tis allowed, that if both the Legatees had survived the Testator, in such Case they would have taken by Moieties; therefore if one of them dieth in the Life-time of the Testator, his Moiety shall descend to the Heir at Law as undisposed by the Will; and as in a Devise to Two, the Word Survivor is implied, therefore the Expressing that Word is of no Weight; because, if it had not been expressed it would have been implied; but if both the Legatees had died in the Life-time of the Testator, then his Heir would have been entitled to the Whole, and so he is to a Moiety; and this was the Opinion of the other Lord Commissioner. Style 434. 3 Lev. 373.

Upon this Difference in Opinion, the Cause was adjourned, and afterwards it was decreed by the Lord Chancellor, that the Trustees should convey the Whole to the Use of the Plaintiff for his Life; and a Moiety of the Inheritance to the Use of him and his Heirs, and the other Moiety of the Inheritance to the Use of the Heir of the Testator. Curia.

For that the principal Rule in Construction of Wills is to follow the Intention of the Testator, which Intention must be collected out of the written Words, and that in Wills artificial Reasoning ought not to be admitted so closely as 'tis in Deeds; and nothing is to be admitted in such Constructions, which is in any wise contrary to the Words.

Nor are any Words to be rejected which may be reduced to bear any legal Construction; 'tis true, if any Words are contrary to Law, or insensible, those must be rejected, and so must the Word Survivors in this Case, there being Two, and no more, to take.

Now,

Now, if this had been a Devise to Two and their Heirs, equally to be divided, it would have plainly made a Tenancy in Common; but as 'tis a Devise to Two and the Survivor of them, and his Heirs, equally to be divided, they shall be Jointenants for Life, and Tenants in Common of the Inheritance; for otherwise the Word Survivor must be rejected, which the Testator could never intend; and it was decreed accordingly.

See 3 Lev. 373. 3 Mod. 290. Blisset *versus* Cranwel, contra.

2 *In*

In the Houſe of Lords.

John Trevor, and other the younger Children of *Sir John Trevor*, Appellants.

AND

Edward Trevor Eſq; Son and Heir of *Sir John Trevor*, late Maſter of the Rolls, Reſpondent.

This Caſe was heard at the Bar of the Houſe of Lords, Feb. 6. 1716. *And was as followeth:*

Ff. SIR John Trevor by Articles dated 23 Octob. 1669, in Conſideration of a Marriage then intended to be had between him and Jane Puleſton, the Widow of Roger Puleſton, and of the Affection he did bear to the ſaid Jane, &c. did covenant with William Salisbury Eſq; and Sir Richard Lloyd (Truſtees therein named) and their Heirs, before the End of two Years then next enſuing, to ſettle and aſſure to them and their Heirs, as their Counſel ſhould direct, all that the capital Meſſuage called Brynkinalt, and other Lands therein mentioned in the Counties of Denbigh and Salop, being the antient Seat of the Family, and all the Eſtate he then had, either in England or Wales, about the yearly Value of 250l. to the ſeveral Uſes in the ſaid Articles mentioned, (viz.) To the Uſe of the ſaid Sir John for Life, without Impeachment of Waſte, then to the Uſe of the ſaid Jane for Life, and after her Death to the Uſe of the Heirs Males of the Body of the ſaid *Sir John*, on the Body of the ſaid *Jane* to be begotten, and to the Heirs Males of ſuch Heirs Males lawfully iſſuing; and for Default of ſuch Iſſue, to the Uſe of the right Heirs of the ſaid Sir John Trevor, for ever.

The Marriage-Articles 23 *Octob.* 1669, decreed to be performed.

And for a farther Strengthening the said Articles, Sir John did thereby covenant, that if the Uses and Limitations therein were not well raised, according to the Intent and Meaning of the said Articles, that he and his Heirs would stand and be seised of the Premisses, until such Time that a farther Assurance thereof should be made, to such Use and Uses as are therein before declared.

Covenant to stand seised.

The Marriage took Effect, and Sir John had Issue by the said Jane, the Respondent Edward, his eldest Son and Heir, born the 5th of November, 1670, and John, Arthur, Tudor, Prudentia and Anne, now Lady Middleton, the Appellants.

But no Settlement was made pursuant to the aforesaid Articles, and Sir John and his Lady (having some Prejudice against Edward, the eldest Son) levied two Fines of the Lands comprised in the said Articles, in the Year 1692, unto Sir John Wynn and Edward Vaughan, and about seven Years afterwards, (viz.) 29 September, 1699, they did by Deed declare the Uses of the said Fines to Sir John for Life, then to the said Jane for Life; and after their Death, then to John his second Son, and the Heirs Males of his Body, with the like Remainders over to Arthur and Tudor Trevor successively, Remainder to his two Daughters, Prudentia and Anne, and the Heirs of their Bodies, Remainder to the right Heirs of Sir John Trevor for ever.

Fines levied in 1692.

Uses thereof declared 29 *Septemb.* 1699.

And as an Inducement to levy the said Fines, and to declare the Uses thereof, as in the said Deed is mentioned, several Acts of Undutifulness were therein recited, (but none proved in the Cause) and also the Marriage of the said Edward with one Mary Staines, against his Father's Consent (who was proved to be born and bred a Gentlewoman, and of a sober and virtuous Behaviour) which Marriage was not until six or seven Years after the said Fines were levied; and it was also recited in the said Deed, that if the said Edward should have the Lands comprised in the said Articles, then Sir John and his Lady would be unable to make Provision for the younger Children.

Sir John Trevor, when he executed the said Deed to lead the Uses of the said Fines, was seised in Fee of several other Lands (which he purchased since his Marriage) of the yearly Value of 600 l. and upwards; and being so seised, he and the said Jane, did by Lease and Release, and Fines levied, settle the same, together with other Lands, which

were the Inheritance of the ſaid Jane, to the Uſe of himſelf, and the ſaid Jane for their Lives, Remainder to John their ſecond Son in Tail Male, Remainder in Tail to his other Children, as in the former Settlement. Settlement of the new purchaſed Lands.

Afterwards Sir John purchaſed other Eſtates in Fee, which upon his Death, deſcended on Edward his eldeſt Son and Heir; and alſo ſome ſmall Parcel of Land compriſed in the ſaid Articles, which were not ſettled by the Deed in September 1699.

The Lady Trevor died in Auguſt 1704. and *Sir John* died Inteſtate, 20 May 1717. and afterwards ſome Diſputes ariſing amongſt his ſaid Sons and Daughters concerning his real and perſonal Eſtate, and who ſhould adminiſter, a Commiſſion of Inſpection was awarded; and upon the Execution thereof, the ſaid Articles were found in a ſmall Trunk with ſome Jewels of Value, which Sir John had depoſited in the Hands of one Evan Loyd, for ſafe Cuſtody; and then Edward Trevor the Reſpondent got a Copy thereof.

After the Death of Sir John, his ſecond Son John entered on the Lands compriſed in the ſaid Articles, under Colour of the Settlement in September 1699. and he and his Brother Arthur Trevor (who was Adminiſtrator to his ſaid Father) got into their Hands all the Deeds and Writings of all his Eſtate.

Thereupon the ſaid Edward exhibited a Bill in Chancery in October 1717. againſt all the now Appellants and others; and amongſt other Things, prayed that the ſaid Articles might be brought into Court, and to have a ſpecifick Performance thereof, and a Conveyance made, as therein mentioned.

The Defendants put in their Anſwer, in which Arthur the Adminiſtrator confeſſed, that the ſaid Articles were in his Poſſeſſion; and they all inſiſted, that the ſame ought to be conſidered as a compleat Settlement; and that Sir John their Father had thereby an Eſtate-Tail, which by the Fines in 1692. and by the Deed to lead the Uſes thereof in September 1699. was docked, and the Lands veſted in the ſecond Son John Trevor in Tail Male, with Remainders over; but if the ſaid Articles ſhould be looked on as executory, and as an Agreement for a farther Conveyance or Settlement, in ſuch Caſe Edward the Reſpondent had other Lands deſcended on him from his Father of a

far greater Value than those comprized in the said Articles, besides his Share of the personal Estate, which ought to be taken as a Satisfaction for the Lands agreed to be settled on him by the Articles; and for that Reason he ought not to have a specifick Performance thereof.

The Decree. Upon hearing this Cause in June 1719. the Lord Chancellor decreed, that John Trevor, and all the Defendants should execute Conveyances of all the Lands comprized in the said Articles, and which were by the Deed 29th September 1699. settled or conveyed to the Defendant John Trevor (with such Remainders over as therein are mentioned) to the Use of Edward Trevor the Respondent, and the Heirs Males of his Body, with the like Remainders to John the second Son, and to Arthur and Tudor successively in Tail Male, Remainder to Prudentia and Anne, and the Heirs of their Bodies, Remainder to the right Heirs of Sir John Trevor for ever.

And as to the other Lands in the said Articles, which came to the said Edward by Descent from his Father, that the said Edward should convey them to the Use of himself, and the Heirs Males of his Body, with the like Remainders over to the Defendants, John, Arthur, and Tudor Trevor successively, Remainder to the Right Heirs of Sir John Trevor for ever; and for that Purpose that the Parties should levy and suffer such Fines and Recoveries as the Case should require, but at the Charges of Edward Trevor.

Which Decree the Respondent by his Counsel insisted to be just for the Reasons following.

First, For that by the Scope of the Articles, they were never designed to be a Settlement, being only a bare Agreement how, and to what Uses and Purposes the Lands therein comprized should be settled; for by the first Part thereof Sir John did covenant within two Years to settle and assure the said Lands to the Trustees and their Heirs, as they and their Counsel should direct to the several Uses in the said Articles mentioned, and also in the said Settlement, as should be agreed on, &c. (viz.) To Sir John and his Assigns for Life, without Impeachment of Waste; and after his Death, then to the said Jane for Life; and after her decease, to the Heirs Males of the Body of Sir John, on the Body of the said Jane to be begotten, &c.

Nor can the Covenant to ſtand ſeiſed, in the latter Part of the Articles, be taken as a final Settlement from the very Words and precedent Part thereof; for 'tis only provisional, and to ſtand in Force till a Settlement ſhould be made in Form, and ſuch a Settlement which would anſwer the Intention and Agreement of the Parties.

Neither can it be preſumed, that Sir John ſhould have a greater Eſtate than for Life; nor that it ſhould be in his Power to defeat his Heir Male of that Proviſion and Eſtate which by the Articles were intended to be made for him, becauſe the Articles were founded upon the Conſideration of his Marriage, and of the Affection he did bear to his intended Wife, and to the Heirs Males of their Bodies to be begotten; ſo that the Conſideration extends as well to the Iſſue Male of that Marriage, as to the Wife; beſides, the Eſtate is expreſly limited to Sir John for Life, without Impeachment of Waſte, which would have been in vain, if he had been Tenant in Tail, becauſe in ſuch Caſe he would have been diſpuniſhable of Waſte.

Moreover, the Lands are directed to be limited after his Death, and after the Death of his intended Wife, to the Uſe of the Heirs Males of their Bodies to be begotten, and to the Heirs Males of the Body of ſuch Heirs Males iſſuing; ſo that the firſt Words are only a Deſcription of the Perſons who are to take, (viz.) The firſt and other Sons, &c. and the ſubſequent Words ſhew what Eſtate they were to take, (viz.) To the Heirs Males of their Bodies.

Now theſe Articles could not be effectually performed without limiting the Eſtate over to Truſtees to preſerve contingent Remainders, and in ſuch Manner, that it might come to the firſt and other Sons of that Marriage, and could never be intended to give a Power to Sir John, to defeat his Lady of her Eſtate for Life, or the firſt and other Sons of that Marriage, from taking it after the Death of the Survivor; nor can it be preſumed, that the Truſtees would have agreed to ſuch a Settlement.

As to the Point inſiſted on by the Defendants, that the Reſpondent Edward hath received a full Recompence and Satisfaction for that Eſtate which he was to have by the Articles, by his Father's ſuffering his Iriſh Eſtate to deſcend to him, this is altogether immaterial; becauſe Edward the eldeſt Son doth not come for Satisfaction or Recompence by Way of Damages, which is quite out of the Caſe; but he claims a Right as a Purchaſer to the ſpecifick Lands

and

and Tenements compriſed in the Marriage Articles, and deſires that the ſame may be ſettled purſuant thereunto; and that againſt the Defendants, who now claim under a voluntary Conveyance made to defeat thoſe Articles; which Conveyance was not made in Favour of younger Children who had no other Proviſion, for they were otherwiſe plentifully provided for, the ſaid John Trevor, the ſecond Son, having an Eſtate of Six hundred Pounds per ann. by the Settlement in October 1699. and there being an ample Proviſion for the Reſt, by the reſpective Shares of the perſonal Eſtate of their Father.

After a long Debate, the Decree was affirmed.

Caſes upon Appeals.

Edward Roper Eſq; Appellant.

AND

Thomas Radcliffe and *William Conſtable*, Two of the Executors of *John Roper* Eſq; deceaſed, Reſpondents.

The Reſpondent's Caſe.

ff. JOhn Roper being ſeiſed in Fee of ſeveral Manors, Lands and Tenements in the Counties of Cornwal, Glouceſter and Monmouth, did by Leaſe and Releaſe, dated the 17th and 18th Days of January, Anno 1708, grant and convey the ſame to the Reſpondents, William Conſtable, Richard Snow, Daniel Hickman, and their Heirs, in Truſt to ſell the ſame, and out of the Money to be raiſed by ſuch Sale, and out of the Rents and Profits till ſold, to pay a Debt of 4000 l. to Heſther and Elizabeth Walden, due to them by a Mortgage of the Premiſſes, with Intereſt; and after the ſaid principal Sum and Intereſt were paid, then in Truſt to them for the Payment of ſeveral Debts mentioned in a Schedule to the ſaid Deed of Releaſe annexed; and the Surplus of the ſaid Money to be paid to ſuch Perſon or Perſons as the ſaid John Roper, by Writing under his Hand atteſted, &c. or by Will ſhould appoint; and in Default of ſuch Appointment, then in Truſt for the ſaid John Roper and his Heirs.

Deviſe of Lands to a Papiſt, is a Purchaſe within the Meaning of the Act 11 & 12 *Will.* 3. To prevent the Growth of Popery.

Afterwards the ſaid John Roper made his Will dated the 5th of March, 1708, reciting the ſaid Leaſe and Releaſe, and the Power reſerved to him therein to diſpoſe the Surplus of the ſaid Money, and deviſed ſeveral Money Legacies to ſeveral of his Relations mentioned in the ſaid Will, and the Reſidue of all his real and perſonal Eſtate he deviſed to the Reſpondents,

ſpondents, Thomas Radcliffe and William Conſtable, Robert Hewit and Daniel Hickman, their Heirs and Aſſigns for ever, and made them joint Executors.

In the Year next following, (viz.) The 1ſt of April, 1709, the ſaid John Roper added a Codicil to his Will, and thereby deviſed ſeveral Legacies to Perſons therein mentioned, and all the Remainder, whether in Lands or in perſonal Eſtate, he deviſed to his ſaid Executors, Radcliffe and Conſtable, the now Reſpondents.

And in the ſame Month, (viz.) The 20th of April, 1709, the ſaid John Roper added another Codicil to his Will, and thereby deviſed to the ſaid Thomas Radcliffe all his Houſhold-Goods, and Power to renew the Leaſe of his Dwelling-houſe if he thought fit; and he deviſed all his Books to the ſaid William Conſtable, and ſoon after he died.

Then Thomas Radcliffe and William Conſtable exhibited their Bill in Chancery againſt Edward Roper, and againſt Snow and Hickman, and others, to have the Truſt-Eſtate ſold, and to have an Account of the Profits, and (after the Debts and Legacies were paid) to have the Surplus-Money ariſing by ſuch Sale, equally to be divided between them, to whom it was deviſed by the firſt Codicil.

To which Bill Edward Roper the Defendant (the now Appellant) put in his Anſwer, inſiſting, that he was Heir at Law to the ſaid Teſtator John Roper, and entitled to all ſuch real and perſonal Eſtate, not ſufficiently deviſed or conveyed by him; and that the Reſpondents Radcliffe and Conſtable are, and at the Time of the Teſtator's Death were Papiſts, and Perſons profeſſing the Popiſh Religion, and as ſuch were rendered incapable by the Statute 11 & 12 Will. 3. of Purchaſing any Lands or Profits out of Lands; and that the Appellant is Heir at Law, and a Proteſtant, and therefore claimed the Benefit of that Act, being capable by Law ſo to do, and demanded the Judgment of the Court, Whether he ſhould be decreed to join in the ſaid Sale.

11 & 12 Will. 3. cap. 4.

And the other Defendants Hewett and Hickman, by their Anſwer, inſiſted, that the real Eſtate deviſed by the Will ought to be conſidered as the remaining Part of the Teſtator's Lands, after ſo much thereof was ſold as would be ſufficient to diſcharge all his Debts and Legacies; and if the other Reſpondents Radcliffe and Conſtable were incapable to take them, being diſabled by the Statute, becauſe they were Papiſts; then the ſaid Defendants Hewett and Hickman, being the two Proteſtant Executors, claimed the ſame, as being

the only Deviſees capable to take by Virtue of the Will; and they inſiſted, that the firſt Codicil, as it related to a Deviſe of the Teſtator's Lands, did not control the Deviſe of the Reſidue of the Teſtator's Lands to Radcliffe and Conſtable, mentioned in the Will, becauſe if they were incapable by the Statute to take the Lands by the Will as Purchaſers, they are to be eſteemed as Perſons not in Being, and that in ſuch Caſe that Codicil was void in Law.

But admitting they were capable of Taking the Remainder by the firſt Codicil, yet that gave them no greater an Eſtate than for Life; and if ſo, then the Reverſion in Fee muſt come to the Defendants Hewett and Hickman; and for that Purpoſe they brought their Croſs Bill, inſiſting upon this Matter as they had done by their ſaid Anſwer to the original Bill; and the ſeveral Defendants, and the Mortgagees and the Creditors having put in their ſeveral Anſwers, and the Legatees having exhibited their Bill to be paid their Legacies, all the ſaid Cauſes came to a Hearing the 27th of June, 1712, before the Lord Keeper Harcourt, who took Time to have the Opinion of the Judges before he would make any final Decree; and a Caſe was ſtated and argued before the Lord Chief Juſtice Parker, the Lord Chief Juſtice Trevor, and Judge Powell; and they likewiſe taking Time to deliver their Opinions, they, together with Sir John Trevor, Maſter of the Rolls, concurred in Opinion, that the Deviſe of the Reſidue of his real and perſonal Eſtate deviſed to the ſaid Radcliffe and Conſtable, after Debts and Legacies paid, was a good Deviſe notwithſtanding that Statute by which Papiſts are diſabled from purchaſing Lands, Tenements or Hereditaments, for the Surplus-Money is a perſonal Intereſt in them, and therefore the Deviſe thereof is not void, either by the Words or Intention of that Act.

And an Account was decreed of the Teſtator's real and perſonal Eſtate, and that the real Eſtate ſhould be ſold to the beſt Purchaſer, to be approved by the Maſter, wherein the Appellant, who was Heir at Law, ſhould join, he being firſt paid his Coſts; and a Receiver of the Eſtate was appointed, giving Security as uſual; and the Money ariſing by Sale, together with the Profits of the Lands till ſold, ſhould, in the firſt Place, be applied to ſatisfy the Mortgage of 4000 l. with Intereſt and Coſts, and then the Schedule Debts with Intereſt; and then all the other Debts ſtanding out and not diſcharged by the perſonal Eſtate, and then

the Legacies should be paid, with Interest and Costs, and the Creditors were to come in to prove their Debts.

And as to Hewett and Hickman, the Court was of Opinion, that the first Codicil, by which the Testator devised all the Remainder, whether in Lands or personal Estate, to the said Radcliffe and Constable, this was a Revocation of the Devise in his Will of the Residue of all his real and personal Estate to Hewett and Hickman, and so their Bill was dismissed with Costs.

From this Decree an Appeal was brought in the House of Lords, and the principal Points insisted on to maintain it were,

That this Devise was no Purchase within the Statute, because the Word Purchase in that Act must be intended where a Man is active in it, and not where Lands are given to him by a Will.

That as Radcliffe and Constable could take no Lands by this Will, because those were conveyed to Trustees, to be sold for the Payment of Debts and Legacies, and the Residue was devised to them, that Residue is no more than a pecuniary Legacy, which they were capable to take notwithstanding the Statute.

That 'tis a standing Rule in Equity, that Lands devised for Payment of Debts and Legacies are to be deemed as Money; and that Money devised to buy Lands is deemed as Lands; and so it is also of Lands or Money in the Hands of Trustees; therefore, as the Respondents were under no Manner of Conviction as Papists, they were justly entitled to this Residue.

For the Appellant. But it was answered, and so resolved, that this Statute intended to abridge the Power and Interest of Papists; and if a Devise should be construed to be no Purchase within that Act, then Papists were in a Capacity to take great Part of the Lands in England, therefore a Devise to a Papist must be a Purchase, (i. e.) To such a Papist who was a Stranger to the Inheritance, but not where a particular Estate or Interest comes to the Heir at Law by a Devise, for that is but a Modification of that Estate which would otherwise descend to him, so as he is under eighteen Years of Age, and conforms within six Months after he should arrive at that Age.

That tho' Lands devised for Payment of Debts and Legacies are to be deemed as Money so far as there are Debts,

and ſpecifick Legacies to be paid; yet ſtill the Heir at Law hath an Intereſt in ſuch Lands by a reſulting Truſt, ſo far as they are of Value after the Debts and Legacies are paid; and the Heir at Law may properly come into a Court of Equity, and reſtrain the Vendor from ſelling more of the Lands than what are neceſſary to raiſe Money ſufficient to diſcharge the Debts and Legacies, and to inforce the Deviſee to convey the Reſidue to him, which Reſidue ſhall not be deemed as Money, neither ſhall it go to the Executors of the Teſtator.

Nay, the Heir at Law in ſuch Caſe may properly come into a Court of Equity, and offer to pay all the Debts and Legacies, and pray a Conveyance of the whole Eſtate to him; for the Deviſee is only a Truſtee for the Teſtator to pay his Debts and Legacies.

This is a Privilege which hath been always allowed in Equity to a reſiduary Legatee; for if he comes into Court, and tenders what will be ſufficient to diſcharge all the Debts and Legacies, or prays that ſo much of the Lands, and no more, may be ſold, than what will raiſe Money to diſcharge them; this is always decreed in his Favour.

Therefore tho' Lands given in Truſt, or deviſed for Payment of Debts and Legacies, ſhall be deemed in Equity as Money in Reſpect of the Creditors and Legatees; yet 'tis not ſo in Reſpect to the Heir at Lay, or reſiduary Legatee; for in thoſe Caſes they ſhall be deemed in Equity as Lands; and if ſo, then the Reſidue in the principal Caſe being deviſed to Papiſts, it ſhall be deemed as Lands; and conſequently 'tis a Purchaſe within the Statute before-mentioned; for which Reaſons the Decree was reverſed in the Houſe of Lords.

Lands given in Truſt, or deviſed to pay Debts and Legacies, ſhall be deemed as *Money* in Reſpect to Creditors, but not in Reſpect to the Heir at Law, or reſiduary Legatee.

See the Caſe next following.

Caſes adjudged upon Appeals.

Die Lunæ 16 *die Februarii Anno regni Domini noſtri Georgii Regis Magnæ Britanniæ* 5. Before *Mr. Juſtice Powis, Mr. Juſtice Tracy, Mr. Baron Mountague, Juſtice Forteſcue, and Baron Page,* Delegates appointed to determine Appeals from the Decrees of the Commiſſioners of the *Forfeited Eſtates.*

The Appeal of the Lord Derwentwater.

The CASE.

A Papiſt being Tenant in Tail, ſuffered a Common Recovery, and declar'd the Uſes to himſelf and his Heirs; this is not a Purchaſe within the Statute 11 & 12 *Will.* 3. for 'tis no new Acquiſition, but a Modification of the Family Eſtate.

1. THE late Lord Derwentwater, the Appellant's Father, being a Roman Catholick, and Tenant in Tail Male of the Lands in Queſtion, with ſeveral Remainders over, did upon his Marriage with the Daughter of Sir John Webb, ſuffer a Common Recovery, &c. and declared the Uſes thereof to himſelf and his Heirs; and afterwards by Leaſe and Releaſe, he ſettled the ſaid Lands to the Uſe of himſelf for Life, then on Truſtees to preſerve contingent Remainders, then to his firſt and other Son and Sons of that Marriage in Tail Male, with ſeveral Remainders over.

Afterwards the ſaid Lord Derwentwater was attainted of Treaſon, and executed; the Appellant his Son, being then an Infant, put in his Claim before the Commiſſioners, and by the Opinion of four againſt three, the Claim was diſmiſſed; from which Decree of Diſmiſſion he now appeals.

The ſingle Queſtion was, Whether a Papiſt, by ſuffering a Common Recovery, and making a Marriage Settlement, ſhall be a Purchaſer within the Statute 11 & 12 Will. 3. for if he is, then this Recovery and Settlement are void. 11 & 12 Will. 3. c. 4.

And this depends upon the Conſtruction of that Statute, by which 'tis enacted, That after the 29th of *September* 1700. Perſons educated in, or profeſſing the Popiſh Religion, who ſhall not within ſix Months after they attain the Age of eighten Years, take the Oaths of Allegiance and Supremacy, and make and ſubſcribe the Declaration, *&c.* ſhall be diſabled, but not their Heirs or Poſterity, to inherit or take any Lands, *&c.* in this Kingdom, *&c.*

And that after the 10th of *April* 1700. no Papiſt ſhall purchaſe mediately or immediately any Lands, Tenements, or Hereditaments within this Kingdom, or Profits out of the ſame, but all ſuch Eſtates or Profits out of Lands ſhall be void.

The Counſel for the Appellant argued, that it was never yet queſtioned, Whether a Tenant in Tail being a Papiſt, could ſuffer a Common Recovery; for if he could not, then he would be barred of diſpoſing his Eſtate, and from providing to pay his Debts, and to make Proviſion for younger Children. For the Appellant.

That the Intent of this Statute was to hinder Papiſts from making new Acquiſitions, and to prevent the Growth of their landed Intereſt, but not to take from them the Power of diſpoſing their Eſtates; it was to make new Purchaſes void, but not the Alterations or Modifications of their own Eſtates.

The Word Recovery is not mentioned in this Statute, and there is no Word under which it may be comprehended, unleſs 'tis the Word Purchaſe; but it would be a ſtrained Conſtruction to make the Appellant's Father a Purchaſer within this Statute by ſuffering this Recovery, and declaring the Uſes thereof, becauſe a Purchaſer always comes to the Eſtate by the Act of the Party; but here the Tenant in Tail came to his Eſtate by Act of Law; and therefore a Papiſt will be Tenant by the Curteſy, and Tenant in Dower, notwithſtanding this Statute, becauſe in both theſe Caſes, the Eſtate is got by Act of Law, and not as a Purchaſer by the Act of the Party.

Beſides, a Purchaſer muſt buy the Eſtate of ſome Body, which in this Caſe cannot be either of the Reverſioner, or thoſe in Remainder, becauſe they are Strangers to the Recovery, and never executed any Conveyance.

Nei-

Neither can this Tenant in Tail be a Purchaſer in Reſpect to the Tenant of the Præcipe, or to the Recoveror, becauſe they are only made Parties by the Direction of the Law, and thro' Neceſſity, and have nothing in Reality, but a Seiſin in Fee for an Inſtant.

So that if this Recovery ſhould be conſtrued as a Purchaſe, there will be a Grantee or Donee without a Grantor or Donor, and the Tenant in Tail muſt be a Purchaſer of himſelf.

When Tenant in Tail ſuffers a Recovery, he makes Uſe of that Privilege which he hath by Law of having a Power over thoſe in Remainder or Reverſion, which Power he executes by ſuffering the Recovery; for it cannot otherwiſe be done; but 'tis inconſiſtent to ſay, that by this Means he purchaſeth the Remainder or Reverſion, when 'tis only a Bar to them to claim the Eſtate; therefore if 'tis a Bar, it cannot be called a Purchaſe.

Beſides, in ſuffering a Recovery, no Body is conſidered but the Tenant in Tail; for if he declares the Uſes thereof, and if the Recoveror ſhould declare other Uſes, thoſe declared by the Tenant in Tail are good, and the other void; ſo if Tenant in Tail is diſſeiſed, and the Diſſeſor and Diſſeiſee join in a Fine, and they and the Cogniſee declare ſeparate Uſes, thoſe which were declared by the Diſſeiſee, and thoſe alone are good; from which it may be inferred, that the Tenant in Tail is the only Party intereſted in the Recovery or Fine; and that the Recoveror or Cogniſee are only made Parties thro' Neceſſity, to keep up the Forms of Recoveries, which are of ſo great Value in the Law, that the Chief Juſtice Dyer tells us that he was not worthy to wear a Gown, who ſhould ſpeak againſt them.

1 Inſt. fo. 10. *a.* By Lord Coke, in his 1 Inſtitute, calls a Recovery a Common Conveyance, and 'tis a Privilege ſo inſeparably incident and annexed to an Eſtate-Tail, that the Tenant in Tail cannot by any Means be deprived of it; therefore if a Gift in Tail is made on Condition, that the Donee ſhall not ſuffer a Recovery, this Condition is repugnant and void, be-

1 Inſt. 224. *a.* 6 Rep. 41. *b.* cauſe the Law gives him a Power ſo to do.

In the principal Caſe, if the Appellant's Father had declared the Uſes to himſelf and his Heirs, this would not have been a new Uſe but the old one; ſo that if he had been ſeiſed a parte materna, and after the Recovery had declared the Uſes to himſelf and his Heirs, in ſuch Caſe the Heirs

* Salk. 590. 3 Lev. 406. a * parte materna ſhould inherit, and thoſe a parte paterna would not; and if he had declared no Uſes, then by Operation

of Law, the Uſe would reſult to the Heirs a parte materna, and they would have immediately been ſeiſed in Fee.

It hath been pretended, that every Alteration of the Eſtate ſhall be taken to be a Purchaſe within this Statute, but 'tis quite otherwiſe; for if a Papiſt is ſeiſed of a defeaſible Eſtate, and levies a Fine thereof with Proclamations, and five Years paſs without any Claim; now by this Means the Eſtate is become indefeaſible; this is certainly an Alteration of the Eſtate, but no Body will ſay 'tis a Purchaſe.

So where the Father being a Papiſt, ſettles his Lands upon his Son, with a Power of Revocation, and after he executes that Power, ſo that the Eſtate is reveſted in the Father, this is likewiſe an Alteration of the Eſtate; but it was never yet called a Purchaſe.

Before the Statute * de Donis, &c. where Lands were given to a Man, and to the Heirs of his Body, &c. upon Condition, that if he die without Iſſue, the ſame ſhould revert to the Donor; yet after Iſſue born he had Power to alien, and to bar ſuch Iſſue, and all Poſſibility of Reverting to the Donor, which he could not do before he had Iſſue; ſo that the Getting a Child made a great Alteration in his Eſtate; but no Man can ſay that he became a Purchaſer by Getting a Child.

* Weſtm. 2. cap. 1. Anno 13 Ed. 1.

It was not inſiſted on by the Counſel on the other Side, that the Lord Derwentwater could not make any Settlement; for certainly if he had been Tenant in Fee-ſimple, this Settlement had been good; but his Gaining a Fee-ſimple by ſuffering a Recovery as Tenant in Tail, and declaring the Uſes thereof, makes no Alteration as to that Matter, becauſe a Common Recovery is a Conveyance which a Tenant in Tail is entitled to make by Law, and thereby to do as much as any Tenant in Fee can do; and the Power of ſuffering ſuch a Recovery is inſeparably incident to every Tenant in Tail, and ſo cloſely united to the Eſtate, that as a Tenant in Fee cannot be reſtrained by any Condition to alien, ſo neither can Tenant in Tail from ſuffering a Common Recovery.

But the Reaſon of the Commiſſioners Decree is, for that the Lord Derwentwater, by ſuffering this Recovery, &c. did acquire a new and greater Eſtate than he had before; ſo that by this Means he became a Purchaſer of ſuch Eſtate.

'Tis true, his Eſtate is new modelled, but not new made; and take it altogether, he hath a leſs Eſtate after ſuffering the Recovery than he had before; for if the Recovery, and the Declaration of the Uſes and the Settlement be look'd upon

upon as one Conveyance, (for so it is in Law) then instead of an Estate-tail, he hath only an Estate for Life; and there is an express Authority, that the Recovery and the Deed to lead the Uses and the Settlement, are but one Conveyance; for so it was resolved in the Lord * Cromwell's Case, where the Bargain, the Recovery, and the Fine, tho' made at several Times, yet all being made by the mutual Agreement of the Parties, were but one Assurance, and tended to perfect the Bargain.

* 2 Rep. 70.

Where Tenant in Tail levies a Fine, or suffers a Recovery, and declares no Uses, in such Case the Use is to him and his Heirs, for it can never result to him in Tail, because that Estate is extinguished by the Fine, and barred by the Recovery; and therefore this Lord having by an express Deed declared what is implied by Law, this express Declaration and Deed must be brought under that Maxim, (viz.) Expressio eorum quæ tacite insunt nihil operatur.

It hath been said, that if the Lord Derwentwater had been Tenant in Fee, this Settlement had been good; now, if that be admitted, then Tenant in Tail in some Sense hath as large an Estate; for as Tenant in Fee may by Feoffment, Bargain and Sale enrolled, Lease and Release, &c. dispose the Fee; so may Tenant in Tail, by using the proper Means he hath by the Law, which is by suffering a Recovery; so that tho' he is not Tenant in Fee in actu, he is so in potentia; and it plainly appears in the Books, that he hath the whole Power over the Estate in his Hands; for the Remainder-Man cannot charge it but at the Will of the Tenant in Tail; for if he suffers a Common Recovery, all such Charges are barred as well as all the Remainders, and shall never take Place, tho' the Tenant in Tail should die without Issue; and that is the true Reason why a Remainder after an Estate-tail is of no Consideration in the Eye of the Law, for it shall not be deemed Assets in the Hands of the Heir; and if an Action should be brought against him, in such Case, Riens per Descent is a good Plea for him. For these Reasons it was prayed, that the Decree of the Commissioners might be reversed.

Econtra against the Appellant.

The Counsel on the other Side, who argued against the Appellant, admitted several Things which were alledged on his Behalf, as that Tenant in Tail hath Power of suffering a Recovery, and by that Means to bar the Issue in Tail, and likewise all Remainders and Reversions; and that such Power is inseparably annexed to his Estate, and cannot be

reſtrained by any Condition; and that where he ſuffers a Recovery and declares no Uſes, there the Uſe reſults to him and his Heirs; but notwithſtanding all this Matter, the Lord Derwentwater was a Purchaſer both within the Meaning and Letter of this Statute.

It cannot be denied but that the Word Purchaſe is mentioned in this Act, (viz.) No Papiſt ſhall purchaſe any Lands, &c. then it muſt be conſidered, Whether this Caſe doth come within the legal Signification of that Word; and as to that Matter, my Lord * Coke tells us, that every Man who hath an Eſtate, hath it either by Right or by Wrong; if by Right, then it muſt either be by Purchaſe or by Deſcent, ſo that there are but two Ways to have a rightful Eſtate, of which Purchaſe is one; therefore this Lord, after he had ſuffered the Recovery and declared the Uſes, &c. not coming in by Deſcent, it muſt neceſſarily follow, that he came in by Purchaſe. * 1 Inſt. 2.

In the ſame † Book 'tis ſaid, that he is a Purchaſer who comes to Lands either by Conveyance or Title; now this Lord came to the Lands in Queſtion by Conveyance, therefore he is a Purchaſer. † Inſt. 3.

The Word Purchaſe hath been taken in this Senſe in other Acts of Parliament, and particularly in the * Statute of Mortmain, by which 'tis enacted, that Lands purchaſed by People of Religion ſhall be forfeited, and that hereafter no Purchaſe ſhall be made to the Uſe of Spiritual Perſons; yet if a Conveyance of Lands is made to them by Way of Gift, or by Will, they were accounted Purchaſers of ſuch Lands. * 15 Ric. 2. cap. 5.

Words in Acts of Parliament are always to be underſtood in that Senſe the Law puts on them; now the Deſign of this Law was to put ſuch Hardſhips on Papiſts, that they might be obliged to part with their landed Intereſt, and transfer the ſame to Proteſtants.

A Mortgage made to a Papiſt is void, ſo that the Incapacity of taking Lands in any Caſe is meant by this Statute, therefore this Lord could not alter his Eſtate-tail, and turn it into Fee-ſimple.

The Words in this Act are very expreſs, (viz.) That no Papiſt ſhall purchaſe; it doth not ſay for a valuable Conſideration, but generally without any Manner of Reſtriction; but in ſeveral Statutes a Diſtinction is made between a Purchaſer generally and a Purchaſer for a valuable Conſideration; and if the Parliament had intended the later, 'tis probable it would have been expreſſed in this Statute.

Now in Conſtruction of Acts of Parliament, it hath been an old Rule, that every Miſchief not expreſly provided againſt is intended to be remedied by the Act; and in the Caſe of * Roper and Ratcliffe where the Decree in Chancery was reverſed in the Houſe of Peers, it was held that a Deviſe was a Purchaſe within the Meaning of this Statute; and if a Deviſe is a Purchaſe, certainly a Recovery and a Declaration of the Uſes to himſelf and his Heirs muſt be a Purchaſe, eſpecially when by the Statute he is capable of taking any Uſe; and he cannot take any reſulting Uſe by Implication of Law, for that would be contrary to the Maxim, expreſſio facit ceſſare tacitum, and he had plainly expreſſed the Uſes by the Deed.

* Antea hic.

Now if this Lord ſhould take by Virtue of this Recovery and Declaration of Uſes either expreſſed or implyed, he would have quite another Eſtate than what he had before; and the Females would inherit, which they could not before, for after making this Settlement, if this Lord had Iſſue a Son, who had Iſſue a Daughter, ſhe would now inherit, which ſhe could not do before, becauſe he was Tenant in Tail Male.

As to the Objection which hath been made, that if this Recovery ſhould be adjudged void by Virtue of this Statute, it would incapacitate Papiſts from ſelling their Eſtates to Proteſtants, the Anſwer is, that there is no Clauſe in the Statute which puts them under ſuch an Incapacity, the Parliament intending it for the Benefit of Proteſtants; and therefore it ought to be taken in the largeſt Senſe, and to extend to every Conveyance by which a Papiſt ſhall take Lands, as well as to a Purchaſe for a valuable Conſideration.

Obj. It hath likewiſe been objected, that the Power of ſuffering a Common Recovery being a Privilege inherent to an Eſtate-Tail, it could never be the Intent of the Parliament to reſtrain that Privilege, eſpecially ſince the Word Recovery is not mentioned in the Statute.

Anſw. 'Tis very true, the Word it ſelf is not mentioned; but as a Recovery is a Purchaſe, it may properly be ſaid to be within the Words of the Statute, and conſequently within the Intent thereof; and to prove that a Recovery is a Purchaſe, it was inſiſted, that as ſoon as 'tis ſuffered, there is an Eſtate in Fee in the Recoveror, and all the Uſes ariſe out of his Eſtate, and a Purchaſer, even for a valuable Conſideration muſt claim the Eſtate of the Recoveror, and not of the Tenant in Tail who ſuffered the Recovery.

Now the Intent of this Act was to hinder Papists from taking greater and better Estates, than they had before, (viz.) from taking a Fee-simple, where before they had only an Estate-Tail, and to restrain them from making Settlements to perpetuate their Estates in their Families.

Where a Papist is Tenant in Tail, Remainder over to another, and he in Remainder conveys his Estate to the Tenant in Tail, this would be a Purchase, and void within this Act.

Now in the principal Case, the Lord Derwentwater got the Remainder by suffering this Recovery; but the Case is the same, whether he got it by Conveyance or Recovery; for both are void by this Statute, which if it should be otherwise construed, it would be in the Power of a Papist Tenant in Tail to bar the Remainder in Fee in a Protestant; and tho' it may be said, that it shall bar the Issue in Tail, and the Remainders, so that they shall never take any Advantage against it; yet the Crown being a Stranger to the Recovery may set it aside, because in Respect of the Crown, the Estate-tail is in Esse; so is the Case of * Crocker *versus* Kelsea, where Tenant in Tail levied a Fine, and declared the Uses to himself and his Heirs, it was resolved, that the Estate-tail was barred as to him who levied the Fine, and as to his Issue; but that in rei veritate, it was not determined, for all Strangers might say, that it was in Being.

* 2 Cro. 688. Hutt. 84.

'Tis true, when Tenant in Tail suffers a Recovery, every one who comes in by such Recovery, comes in † Continuance of the Estate-tail, and must be liable to all the Charges made by the Tenant in Tail, and the Charges of those in Remainder are barred; but this doth not prove, that an Estate-tail is as large as an Estate in Fee, which is the Point now in Question; therefore if this Lord hath gained a new and greater Estate than he had before; 'tis plain such Estate is void within the Intent and Words of this Statute.

† Benson *ver.* Hodson. Raym. 236. 1 Mod. 108. 2 Lev. 28.

The Question is not, Whether a Recovery suffered by Tenant in Tail shall bar the Remainders and Contingencies expectant upon such Estate; but whether he who suffered the Recovery shall (after the Making this Statute) take any Advantage of it after 'tis suffered.

As to the Case put on the other Side, (viz.) That where Tenant in Tail *a parte materna* suffers a Recovery, and declares no Uses, in such Case the Use shall be to the Heirs a parte materna; this is not Law; 'tis true, 'tis so where a Man is Tenant in Fee-simple, but not where he is Tenant in Tail.

Upon

Upon the whole Matter it was inſiſted, that the Lord Derwentwater was a Purchaſer within the Words and Intent of this Statute; therefore it was prayed, that the Appeal might be diſmiſſed.

Curia. But the Decree of the Commiſſioners was reverſed by the Delegates, by the Opinion of Four againſt Juſtice Forteſcue.

'Tis plain, that a Papiſt under the Age of eighteen Years, at the Time of Making this Statute, may take either by Deſcent or Purchaſe, and that the Word Purchaſe in this Statute is only a Modification of the Eſtate, and ſhall not be taken in the full Extent of the Word; for thoſe Purchaſes are only intended by the Statute, by which Papiſts enlarge and extend their landed Intereſt, and not where by Deeds of Settlement the antient Family Eſtate is new modelled, without making any new Acquiſition; ſo that even at this Day a Purchaſe by Limitation in a Settlement, or by a Deviſe to a Papiſt under the Age of eighteen Years, is good, ſo as ſuch Papiſt, within ſix Months after he comes to that Age, conform and take the Oaths, &c. otherwiſe he loſes the Pernancy of the Profits during his Life only.

The Arguments of the then Chief Justice of *B. R.* in the Case of *Roper* and *Radcliffe, &c. ante* pag. 167.

THE first and great Question in this Case is, Whether the Interest devised by Mr. Roper be such an Interest, or of that Sort as is within the Words (or Intent) of this Act. Stat. 11 & 12 W. 3. c. 4.

And herein 'twill be proper to consider,

1. The Words of the Act.
2. The Nature of the Interest.

1st, There are two Expressions (or Clauses) in the Act that concern this Point.

1. By the First, Every Papist, or Person professing the Popish Religion, is disabled and made incapable to purchase any Manors, Lands, Tenements, Rents or Hereditaments in his own Name, or in the Name of others, to his Use, or in Trust for him.
2. By the Second, All Estates, Terms, and any other Interests or Profits whatsoever, out of Lands, Tenements, or Hereditaments, made after the 10th of *April*, 1700. to, or in Trust for the Benefit of a Papist, *&c.* are made void.

So that all Lands, Tenements, Rents, and Hereditaments, are within the 1st; and,

All Estates and Terms, inheritable, or not; and,

All other Interests or Profits whatsoever, out of Lands, (&c.) are expressively within the 2d.

There are no qualifying Words to make it material, Whether the Term or Interest be long or short, or what other Circumstances it be attended with, provided it be, out of Land, *&c.*

And the Word Whatsoever, seems to be added, on Purpose to shut out all Pretence of Distinction between one Estate, Term, Interest, or Profit out of Land, and another.

Now, As to the Interest devised to Mr. Constable and Mr. Radcliff, It is a Trust, and an Interest, and as such 'tis demanded by their Bill.

And of what Nature it is, will appear by the Deed, the Will, and the Codicil, whereby it is created and diſpoſed:

The Creation of it was thus,

Ante 167. MR. Roper by Leaſe and Releaſe conveys ſeveral Lands and Manors in the Counties of Cornwal, Glouceſter, and Monmouth, particularly named; and all other his Lands, Tenements, and Hereditaments in thoſe Counties, to William Conſtable, Eſq; R. Hewet and Daniel Hickman, and their Heirs, upon Truſt, as ſoon as conveniently may be, to make Sale of the Premiſſes in Parcels, or in the Whole, to the beſt Purchaſor or Purchaſors, and for the beſt Price or Prices that can be reaſonably had or gotten for the ſame; and by and out of the Rents and Profits ariſing (thereout) till ſuch Sale; in the firſt Place, to pay 4000 l. owing to Sir Robert Cotton and John Proby, ſecured upon the Lands in Cornwal, with the Intereſt thereof; and then to pay the Debts in the Schedule, being three Debts, amounting to 390 l. And then

To pay and diſpoſe the Reſidue to and for the Benefit of ſuch Perſon and Perſons, and to and for ſuch Ends and Purpoſes, and in ſuch Manner as the ſaid J. Roper, by any Writing or Writings under his Hand and Seal, teſtified by three, or more, credible Witneſſes, or by his Laſt Will and Teſtament in Writing ſo teſtified, ſhall direct, limit and appoint; and in Default of ſuch Appointment, or until ſuch Direction, Limitation or Appointment ſhall be made, to pay and diſpoſe of ſuch Reſidue or Overplus, to and for the Benefit of the ſaid J. Roper and his Heirs.

And the Truſtees are declared chargeable only for ſo much as they reſpectively ſhall actually receive.

The Truſt being thus created, J. Roper makes his Will, and reciting the ſaid Deed in Purſuance of the ſaid Indenture, or by any other Power veſted in him, he gives, deviſes and bequeaths out of the Surplus of the Money ariſing, or to ariſe by and out of the Sale or Sales of thoſe Manors, Lands and Premiſſes, and by and out of the Rents and Profits of the Premiſſes ariſing till ſuch Sale, the ſeveral Sums following; and ſo diſpoſes of ſeveral Sums, in all about 1600 l. and then goes on. "And as to all the Reſt and "Reſidue of my Eſtate both Real and Perſonal, of what "Nature or Kind ſoever, I give, deviſe and bequeath the "ſame to the ſaid William Conſtable, and unto the Honour-

"able

" able T. Radcliffe, Esq; Robert Hewet, Gent. and the said " Daniel Hickman equally, and unto their Heirs and Assigns " for ever. And makes them Executors.

And afterwards adds a Codicil, and disposes of 140 l. in Legacies (tho' out of the Lands) and then goes on thus, " All my Remainder, whether in Lands or in personal Estate, " I leave to my worthy and beloved Executors T. Radcliffe " and William Constable.

The particular Times of executing these several Instruments appear not; but their Dates are near together, viz.

The Lease and Release 17 & 18 January,	1708.
The Will 5 March,	1708.
The Codicil 2 April,	1709.

So that the Trust now contended for, is that Trust which Mr. Roper reserved to himself and his Heirs, in the Surplus of the Money to be raised by the Sale of his Lands, Rents, and Profits, and till Sale, after the Payment of the several Debts and Legacies appointed.

And it is devised by the Will, To his four Executors, and their Heirs, under the Title of The Rest and Residue of his Estate Real and Personal. And by the Codicil, To two of those Executors, under these Words, All my Remainder, whether in Lands or personal Estate.

And there appears no other Estate to answer the Words Real Estate in the Will, or other Lands (or personal Estate) to answer those in the Codicil, but this Trust.

The Lands are not turned into Money in his Life-time, but remain yet unsold in the Hands of the Trustees, subject to, and charged with this Trust.

And the Question now is,

Whether this Trust, this Right to the Surplus, to be receiv'd out of those unsold Lands, be within this Act of Parliament? i. e. Whether it be an Hereditament or an Estate, or any Interest or Profit whatsoever out of Lands?

(For if it be any of these, it seems clearly within the Act).

This may be considered in two different Views:

1. As it agrees with those other Sums appointed to be raised by this Trust, in this Respect, That it is a Right to something to be raised out of Lands.

2. As it is distinguishable from those other Sums, in Respect of its being a Surplus, after the other Charges are paid off.

(1) First, Had this not been a Surplus, but a certain Sum appointed to be paid out of those Lands, it must be admitted to have been within the Act; for that says, Any Interest or Profit out of Lands for the Benefit of Persons professing the Popish Religion.

Now, That it is for the Benefit of Persons professing the Popish Religion, is agreed.

And, That it is an Interest in (or out of) Lands, seems most clear: For,

1. The Trustees hold the legal Estate in the Lands, not at all for their own Advantage, but (in the Words of the Act and of the Trust) for the Benefit of others.
2. Suppose the Executors and Legatees, and those who are entitled to the Surplus, release to the Trustees all their Right in the Land, it will extinguish this Right. And in such Case the Trustees, who had before only a nominal Estate, will then have the beneficial Estate too; i. e. The whole Fee both legal and equitable.
3. If they grant all their Right, Title, and Interest in those Lands, this (Interest) will pass.
4. If they should grant the Land it self, it can be no Question but This will pass.

Also we may consider the Nature of this Interest further, as it is a Right to a Sum to be raised out of Land.

1. The Estate and Concern of the Trustees therein, viz.

They have an Estate in Fee, in Trust, to apply the Profits, or permit them to be apply'd for the Benefit of the Persons to whom the several Sums to be raised are appointed to be paid.

1. If there were not an express Appointment for them to sell, but that the Monies were to be raised out of the Profits; they could not sell without Consent of him that has the Surplus, but must be contented to take the Profits as they arise.
2. Tho' there be an express Trust and Power to sell, yet it only authorizes them to sell. If, and when they can. And on the best Prices, &c. And in the mean Time all the Profits are in their Hands by Anticipation; and the Trust (or Right) is to be managed in the same Manner as if to be raised out of the Rents and Profits only.

2. Consider,

2. Consider the Interest and Power of the Trustees, viz.

They amongst them have the whole Trust of the Lands, which is a Power over the Estate therein. And Those who are entitled to have particular Sums raised, have particular Trusts carved out of the Inheritance in Nature of Chattel Interests. For,

He that has 500 l. appointed to be raised out of an Estate of 100 l. per Annum, has an Interest (in the Land) of like Nature, and much of the same Continuance, as if he had a Trust (therein) for five Years.

If the Trustees make not the most of the Lands, or suffer not him to do it, they break their Trust. A Trust to sell being, as I observed before, but in Nature of a Power to sell. And,

1. Till Sale, his Right to the Profits is the same as if no such Power.
2. By Sale, his Interest in the Land is gone, and he now has a Trust in the Money, and is paid so much the sooner.

Secondly, This Trust now in Question may be considered as it is distinguishable from the particular Sums to be paid out of those Profits, in Respect of its being a Right to a Surplus after Debts and Legacies paid. (2)

And in that Respect I think it yet more clearly within the Act.

1. Upon the Construction of the Deed. For thereby it was so vested in J. Roper, as to be not only an Interest and Profit out of Lands, but such a one as was an Hereditament, and descendable to his Heirs, it being expressly reserved To *J. Roper*, and his Heirs. And 'tis agreed on all Hands, That Ed. Roper, the Heir, would be entitled to it, if the Will and Codicil were out of the Way. And,

If 'twere merely personal, a Limitation to him and his Heirs would vest it wholly in him, and it would go to his Executors.

2. The constant Opinion in Chancery. All the Cases there, both for and against Heirs, who have sued for such Surplus, are Authorities, That the Trust of such a Surplus is a Real Estate, and descendable to the Heir of him who created it.

But before I state the Cases, I would mention That, which is the Ground both of these Cases of Trusts, and also of the Cases of Uses executed by the Statute.

1. And, First of Uses.

A Use, before the Statute of Uses, was a meer Trust cognizable only in Equity, and is since expounded in the Common Law Courts by the Rules of Equity; and as to that, I would use the Words of Lord Ch. Just. Cook, 1 Inst. 23. a. Whosoever is seised of Lands, has not only the Estate of the Land in him, but a Right to take the Profits, which is in Nature of a Use.

So that if the Lands descended of the Part of the Mother, the Use shall go to the Heir of the Part of the Mother, which could not be if it were not the old Use (or Estate) but only a Thing newly created. And the like Law is of the Custom of Borough English, Gavelkind, &c.

See Salk. 679.

This is called a Resulting Use.

And the Law is the same, if after the particular Uses there were an express Limitation to the Feoffor and his Heirs. 1 Inst. 22. b.

Indeed some Books do mention this last as a new Use: But it has been divers Times resolved and settled to be the old Use, as in Godbolt and Freeston's Case, and Abbot and Barton's Case, in C. B. Trin. 7 Ann.

2. Secondly, As to Trusts.

A Man in Consideration of Equity has an Estate in Land as a Trust; this is as a Use in Consideration of Law, and follows the Person of Cestuiq; Trust, being a beneficial Interest and Profit. And so much of the Trust as in a Conveyance is undisposed of, the Executor (Q.) has in him as his antient Trust.

This is called a Resulting Trust.

And if the Disposition be by Will, the like resulting Trust will descend to the Heir as Part of the antient Trust not devised from him.

So a Conveyance or Devise to Trustees to pay Debts, passes the whole Estate in Law, and Part only of the Trust; that is, Trusts for the particular Sums in Nature of Chattel Interests, after which the Residue of the Trust results to him or his Heir as undisposed; and such Residue is the Fee of the antient Trust descendible; as in Culpeper and Austin's Case, Mich. 28 Car. 2. 2 Chan. Cases 223. And

Trin. 34 Car. 2. It was laid down as a Rule, That when Lands are appointed to be sold, or are conveyed in Trust to

pay Debts, the Heir is entitled to have the Lands after the Debts paid, by an implied and resulting Trust. And Pasch. 32 Car. 2. 2 Ventr. 349. If Lands be devised for the Payment of Debts and Legacies, and the Residue of the personal Estate be given to the Executor (after Debts and Legacies paid), the Personal Estate shall notwithstanding, so far as it will go, be applied to the Payment of the Debts and Legacies, and the Land no further charged than is necessary to make up the Residue.

And Mich. 33 Car. 2. 2 Ventr. 399, or 355. If a Man makes a Lease, or devises an Estate for Years (he being seised of an Estate of Inheritance) for Payment of Debts, If the Profits of the Land surmount the Debts, all that remains shall go to the Heir, tho' not so expressed; and albeit it be in the Case of an Executor.

Also the Case of Cook and Gwavas in Scaccario, 25 Jan. 33 Car. 2. was thus: J. Cook, 28 Julii, 1671. after several particular Legacies, devised all his Goods and Chattels to R. Cook, Esq, Eliz. Cobb and William Gwavas, to their own Disposition, and makes them Executors: And by Indenture of the same Date demises several Manors and Lands in Norfolk to the said Cook and Gwavas for 500 Years, upon Trust for himself for Life, and after his Death upon Trust out of the Rents and Profits to pay his Debts, Legacies, and funeral Expences; and four Years after to attend the Inheritance.

The Plaintiff, as Grandson and Heir to J. Cook, exhibited his Bill to have an Account of the Personal Estate, and of the Rents and Profits of the Real Estate, and that the Personal Estate might be applied to pay Debts and Legacies, in Ease of the Real.

The Defendants, the Executors, insisted, That they were entitled to the Personal Estate, as a Legacy, and the two Trustees claimed the Profits of the Lands for four Years after the Debts and Legacies paid, as an implied Gift, the Term being appointed to attend the Inheritance after four Years. But

Decreed, That the Personal Estate be applied in Exoneration of the Real Estate; and that the four Years be in Trust for the Complainant, and such other Persons as shall have the Freehold and Inheritance; and to attend the said Freehold and Inheritance.

The Case of Sir John Packington & Ux. in Scaccario, 22 Junii, 1708. and 30 Maii, 1709. Sir Herbert Perrot, by Will dated 21 Junii, 1682. made his Wife (who afterwards married

married Sir Cyrill Wyche) Executrix, charging her to see his Will performed, and thereby gives her a Rent-Charge of 205 l. with this special Trust, That she may be supply'd with Money for the Payment of all his Debts and Legacies; To which End, I do hereby give to my said Executrix a Lease for thirteen Years, to begin within six Months after my Decease, of all the said Rent-Charge of 205 l. per Ann'.

And this was decreed to be a Trust for the Heir after Debts and Legacies paid; and this Decree was affirmed in Parliament 15 Maii, 1712.

These Cases were indeed upon Terms for Years, but the Ground of them was this, That tho' all the Term was parted with, yet only Part of the Trust thereof was disposed; and that not only the Inheritance, but likewise all the Trust undisposed (i. e. the whole Trust of the Inheritance, and the Residue of the Trust of the Term) descended to, and was Part of the old Trust in the Heir.

And the Reason is the same where it is of an Inheritance; If only Part of the Trust be disposed of for Payment of Debts or Legacies, &c. The Residue of the Trust remains still undisposed.

There have been divers Cases of that Kind, viz.

North *versus* Crompton, 1 Chan. Cases 196. Catharine Crompton seised in Fee of the Lands in Question, by her Will dated 21 Jan. 1669. devised to H. North, Esq; her Executor, all her Estate real and personal, to dispose of for Payment of all her Debts and Legacies; and int. al. gives 200 l. to the Defendant, her Uncle, and Heir at Law. And upon the Hearing, two Questions were made.

1. Whether this was a Devise in Fee; And, 2. Whether Mr. North (the Defendant claiming by an implied Trust after Debts, &c. paid) might not aver against that Implication? And after long Debate it was decreed against the Heir at Law, viz.

1. That a Fee did pass by the Devise; And, 2. That there was not any implied Trust of the Surplus for the Heir, because there was 200 l. given to him, which was to no Purpose, if the Surplus had been intended him.

Which Case plainly admits a resulting Trust in the Heir, unless the Intent of the Testatrix appeared to dispose it from him. And in this Case we may observe, That the Question was singly, Whether there were any Trust at all created, or intended, as to the Surplus; but not the least Doubt, That if all had not passed, the Residue would have gone to the Heir.

And all these Cases suppose this Ground and Rule, That if any Part of the Trust were undisposed, it was the old Trust, descendable to the Heir. And the Labour of all the contending Parties is to shew, That it is, or is not all disposed.

But in the present Case there is no Question, but that the Grantees were bare Trustees of the Surplus. A Trust is here on all Hands admitted; it is indeed expressly declared, and our Question is only concerning the Nature of it, i. e. Whether descendable, or not?

Now all the before cited Cases admit 'tis descendable, if there be one; for they no where tell the Heir, That the Trust, if there be any, is not descendable. But the single Answer they rest on is, That there is no Trust at all.

The Case of Coote *versus* Moore, 22 Jan. 1691. went yet further.

William, Earl of Meath, conveyed several Manors and Lands in Staffordshire to the Countess of Drogheda, and one Humphries, To the Use of himself for Life, with Power to sell, and pay Debts, in a Schedule, and what other Debts he should owe at his Death; and to pay the Surplus to his Daughters, who were his Heirs; and afterwards devised his personal Estate to his Wife.

He sold Part of the Estate himself, and contracted for Sale of other Part thereof, and died; and 17 Julii, 1655. upon a Bill of the Purchasors to have their Purchase perfected, it was declared, That the personal Estate ought to be applied in Aid of the Real Estate for the Benefit of the Heirs. And afterwards on a Bill by Sir P. Coote, who married the Lady Eliz. one of the Daughters, and the said Lady his Wife; and by the Lady Catharine Brabazon, the other Daughter, on the 27 Jan. it was decreed, That the particular Estate should be applied to exonerate the Real Estate in favour of the Heirs at Law; and yet there was no Real Estate but this Surplus, which was look'd upon to be a Real Estate. And this Decree was affirm'd in the House of Peers in 1692. (Note, The Division of the House was equal). And I observe from the printed Case which I have seen, That that which the Appellant rely'd upon was,

1. The constant Intention of the Earl, that the Countess should have the Personal Estate.
2. That the Trust Estate was expressly charged with Debts.

But nothing was urged, That it was not an Inheritance.

And I take it to be the constant received Opinion in this Court, That this sort of Trust is inheritable.

1. Now suppose the Trust had been, To raise the several Sums out of the Profits, and to pay the Residue of the Profits to him and his Heirs; no Doubt but this had been Part of the antient Trust, and inheritable, and would descend to his Heir. And the Trust to sell, as I before observed, is but a Power till executed; and the Trust differs nothing from that in the mean Time.

2. Suppose a Man seised in Fee gives Power to his Executors to sell his Lands, &c. and to pay the Money or Surplus to his Heirs; he there has Power over the legal Estate, as here he has over the Trust; but till that Power be executed, the old Fee descends to the Heir; and when it is executed, then arises a Trust in the Money in Lieu of that in the Land, which is now sold and turn'd into Money.

As in the Case of Abbot and Burton, in C. B. before-mentioned, A. conveys her Lands to several particular Uses; and after the particular Estates ended, To the Use of her and her Heirs, with Power to appoint the same to such Persons, and for such Estates, as she should think fit, till such Appointment made; here the Use to her and her Heirs is, no Doubt, the old Use; and if not directed by an Appointment, shall descend to her Heir; and if the Land came from the Part of the Mother, shall descend to the Heir of the Part of the Mother.

3. I observe some Part of the Land in the Deed belong'd formerly to Dame Dorothy Drummond, who was J. Roper's Mother's Mother; and then if they descended to him from her, and he had made no Will or Codicil, but the Trust, according to the Limitation in the Deed, had been to the Heir; I would be glad to know what Heir would have had it. Would it not have been the same Heir who would have taken the Lands if they had not been charged? No Doubt such a Resulting Use, a Use limited by him, to him and his Heirs, would have gone to the Heir on the Part of the Mother. And surely the Trust of the same Lands, being so much of the same Trust undisposed, must have gone the same Way.

4. I take it, That the Trust, if not devised away, would have been Assets by Descent in the Hands of the Heir, upon the Statute of Frauds and Perjuries.

5. That when it is so devised, the Heir is so far disinherited, and the Devisee put in his Place.

6. That a Devise of all his Personal Estate would not pass it, &c.

This is the Nature of it, as it ſtood in J. Roper himſelf; and I take it, That upon the Deviſe here it is no Way altered. Here is no Alteration appointed.

I think it would have made no Difference, if he had given it by Way of Appointment. But here it is given as Part of J. Roper's Eſtate, and conſequently not being any Part of his Perſonal Eſtate, it muſt be Real. By the Will it is given by the Name of the Reſidue of his Real Eſtate, and in the Codicil 'tis called his Remainder in the Land.

So that the Deviſees (if the Deviſe be good) have the Truſt (in the Lands).

1. As it was in J. Roper: And, 2. As it would have been in his Heir: And therefore,

1. An Hereditament. 2. A deſcendable Truſt in the Land.

I ſhall now in the next Place conſider the Conſequence, if this Caſe ſhould be conſtrued to be out of the Act of Parliament.

I think it has been rightly obſerved by the Counſel for the Plaintiffs at the Bar, and by all who have ſpoken to it on the Bench; That the Deſign of the Makers of this Law, was, 1. To get the Lands of this Kingdom out of the Hands of Papiſts; and therefore it lay Difficulties upon them in keeping of their Lands, in order to induce them to ſell them. And, 2dly, To prevent them from making any new Acquiſitions.

I agree likewiſe, That the Reaſon of the Parliament in forming this Deſign probably was, That they looked upon the landed Intereſt to be the Strength of England. For that ſuch Intereſts and Eſtates in Lands give great Authority and Influence over their particular Tenants, and other Dependants.

That it might influence Elections to Parliaments, if Papiſts, &c. have Power to make their Tenants Freeholders, or to accommodate with their Lands ſuch as had no Freeholds of their Own, by ſome other Title.

And I obſerve, That in many of the weſtern Manors (ſome of theſe perhaps are of that Sort) the Tenants are frequently Freeholders, or have other Rights of Voting (in Corporations, &c.)

In ſhort therefore, the Law-makers ſeem to me to have eſteem'd Eſtates and Intereſts in Lands to be Weapons, which

which Papists, when they had them in their Hands, made use of against the Publick and the Government.

I observe likewise, That they have expressly and particularly provided against Terms made to Papists; so that by the express Words of the Act, a Term for two Years; nay, for ought I can see, a Term for one Year, or for any certain Time, is prevented from being made to Papists.

It seems, They thought an Interest of so short a Continuance (tho' not of so great Mischief or Danger as an Inheritance) was yet of some Mischief, and so much as to deserve a Remedy.

And I observe, That the Trust of a Term is as much within the Act as a legal Interest in the Term; and that the Estate in the Hands of the Trustees of a Papist is of the same Consideration, as while it is in his own Hands.

Let us now consider a Trust of this Sort as is here devised, and see what Difference there will be between this and the most direct Trust in Land, or any the most open and notorious Term or Estate in Land. And to me it seems plain, That there will be the same Influence over Tenants and others, as in the Case of a direct Ownership.

We are now upon the Nature of a Trust in general, and not upon the particular Circumstances of this Case; so that a greater or lesser Estate, a greater or lesser Charge, a greater or lesser Surplus, will make no Difference in this Point, whether within the Act, or not?

Suppose an Estate of 1000 l. per Annum is conveyed to Trustees, on Trust to sell and pay off 3000 l. and a Papist has a Right to the Surplus. The Management of such Sale falls naturally into the Hands of himself. And the Insolvency of Tenants or Smallness of the Rents, is only his Loss. And the Sinking of the Debts, and Increasing the Surplus, is to his only Benefit; therefore the putting in, or out of Tenants, agreeing upon the Terms and Rents, and Forbearing, Arresting, or Distraining the Tenants, &c. will of Course be according to his Pleasure. Also,

The Trustees are his Friends, and therefore named Trustees for him: And they willingly and most safely leave it to his Management; nor can they safely interpose or act otherwise, (than he desires) without Hazard and Trouble. But,

Suppose the Management were in the Trustees, yet they are the Trustees of a Papist, and for his Benefit, which is equally within the Act.

(1.) Well, but ſay they, The Sale will put an End to this, ſo that it can be of no long Continuance.

Anſw. Any Term, as I have ſaid, is within the Act, as for a ſingle Year, perhaps for Half a Year, certainly for two Years. And this in the Nature of it muſt exceed that Time. For it muſt wait ſome Time, either to meet with the beſt Chapmen; or to get the beſt Price.

And this is to be for every Parcel or Part.

So that here is no Certainty, nor even Probability of the Ending of this Truſt in many Years.

(2.) 'Tis ſaid he is only a Tenant at Will to the Truſtees, and they may ſell without him.

Anſw. He is indeed but Tenant at Will to them; but they have no Will but his.

Which Way then can a Sale be expected without his Conſent? For,

1. The Truſtees are his Friends, and they (or he) may either diſparage the Title, or object to the Price, or pretend better Bidders; or may ſay, 'tis unreaſonable, or that they will have a better Price, &c.

2. As to the Executors and Legatees, if they preſs the Sale, 'tis but giving them ample Security; they may be made eaſy with Intereſt, &c. And if there be no other Way, 'tis but to get a Friend to advance the Money, and all will be eaſy.

3. But you'l ſay, The Chancery will ſet all Right, i. e. order a Sale of the Land, and turn it into Money. But, How ſhall it come there when all the Parties are made eaſy, viz. The Executors and Legatees are ſecured or ſatisfied; and the Heir of him that made the Conveyance will declare, 1. That he has no Intereſt. 2. That the Conveyance in Truſt is good; and, 3. That the Truſt is not within the Act. And in the End muſt only pay Coſts, if decreed againſt him. And,

4. As to the next Proteſtant of Kin, &c. ſhould he come to pray a Sale of Part, and to have the Profits of the Reſidue, &c. In that Caſe no Court may decree the Whole to be ſold. So he will fare no better.

1. But we will ſuppoſe it depending in Chancery (which may be a long Time firſt, and longer before it come before a Maſter, and longer ſtill before a Decree) yet fair Bidders may be wearied, &c. by Bidders of their own, and (if theſe will be ſturdy) out-bid at laſt: And where no Body's Intereſt is

to follow it) easily fly off; or if they do not, yet the Papists paying their own Money, receive it again themselves, and take a Conveyance in the Name of their own Trustees: And if this be undiscovered, all is well; or if it be discovered, the Conveyance, 'tis true, is void by the Act; but then it revests again in the first Owner or Trustees: And the Consequence is, That

They are to begin the same Round again; nor can I see any End this Way, where it is no Body's Business, Interest or Inclination to sue; so that the Management of the Cause may continue for Ages. To which no End is likely to be put.

2. But suppose the 3000 l. Debts and Legacies paid by Perception of the Profits before there can be a Sale; or suppose he that has the Surplus buys them off (as he may well do, if they are not within the Act). And if by either of the said Ways he becomes the single Owner of the said Trust: What is the Nature of his Interest now?

He has now the entire Trust of the Land, the Rents are merely his, &c. Has he yet no Interest or Profit out of the Land? Who shall have the Management or Power over the Tenants? if not himself. And the Estate of the Trustees is now not in the least for their own Advantage, but for the Benefit of Papists.

3. This will open a Way, not only for a Papist to take by Devise, but to buy or purchase this Sort of Ownership of others; for what is not within the Act may as well be bought as given. Which Sort of Exposition will, I apprehend, overturn the Act, and will have no other Effect, but that some very learned and ingenious Gentlemen, who attend here upon this Occasion, must, or will for the Future, dress up their Trusts in a new Form.

I own, with me, it is a Difficulty to say, That such a Trust as this, is neither Tenement, Hereditament, Estate, Term, nor any other Interest or Profit whatsoever out of Land; and I know not whether to shut this out of the Act, I must not go further and say, That this Estate in Fee in the Trustees is not any Land, Tenement, Hereditament, or any Interest or Profit whatsoever. For if it be any of these, it is plainly in Trust for the Benefit of Persons professing the Popish Religion, and therefore within the Clause and Provision of this Act.

To prove this not to be within the Act, great Variety of Arguments have been used. And they say, That the Argu-

ments on the other Side prove too much, and tend to great Hardships, viz.

1. That this would disable a Papist to make Provision for his younger Children, if such a Trust to make or raise their Portions were void.

2. That it would avoid a Provision for Popish Executors, &c. and they would therefore distinguish upon the Act, and say,

3. That the Act only intends the Continuing of Estates in Papists, and that here all is to be sold, and by Consequence there is no continuing Interest in the Land.

4. That the Act only intends real Estates, but that this is Money, and merely personal; and as an Instance say, A Mortgage in Fee till foreclosed, the Money is in Equity personal Estate, and shall go to the Executors.

5. That Estate, Term, Interest, and Profit out of Land, mean only Perception of Profits, and not Money to be raised by Sale of the Land.

And they argued further and said,

6. That a Man may sell his Land, and give the Money to a Papist; and therefore he may appoint another to sell it, and to give the Money, &c. Qui facit per alium, facit per se.

7. That this answers the Intent of the Act, to turn Popish Lands into Money.

Before I answer these Particulars, I would observe in general.

1. That the Arguments used of the Hardships to Papists are of little Force against an Act of Parliament, which is professedly intended to bring Hardships upon them.

2. That the Distinctions which have been offered do not arise from any Words in the Act, but from some Guesses at what may be thought too hard or unfit, which I think cannot controul the express Words; for that would indeed be repealing the Act instead of construing it.

3. That the Words in this Act are contrived on Purpose to exclude all Distinctions, and seem very strong for that Purpose, viz. All Estates, Terms, or any other Interest or Profit whatsoever out of Land. So that, let it be long or short, permanent or transitory, descendable or testamentary, of what Nature or Kind soever, or whatever Interest or Profit it be, if it come out of Land, it seems comprised within the express Words of this Act.

4. That if this be a descendable Interest, as I have endeavoured to shew, all those Arguments fall; tho' I shall endeavour

vour to shew them insufficient, were it no descendable Interest.

5. That in no Case is any Distinction to be admitted in expounding an Act of Parliament, which opens a Way to destroy the Act, as I think this would.

So that should I not satisfactorily remove all the Difficulties objected, yet they would not be of Weight to alter the Words and natural Construction of the Act.

But to the foregoing Objections I give these particular Answers, viz.

1. The Act does not disable a Papist from making any Provision for his younger Children, which they are enabled to take; but those which they cannot take, he cannot make for them; as a Rent-Charge, or a Lease of Lands, and as I conceive, a Trust of Lands.

But what is the Consequence of this? That they must not be provided for? No, but must be provided for in a proper Method, i. e. Let him give them Money; If he has it not, why does he pretend to keep his Land when he wants Money for the Occasions of his Family.

This is a proper Method to attain one End of the Act, i. e. To work Papists out of their Lands; and putting a Necessity upon them to sell, is agreeable to the End and Design of the Act. If he sells the Land or Interest therein himself, 'tis certainly done; but if he raise a Trust, 'twill perhaps never be done, or paid off by the Popish Heir, &c.

So that this is so far from being an Objection, That 'tis an Argument that the Act should extend to it.

2. As to Popish Executors, &c.

Answ. They cannot take Lease or Grant, and consequently not Mortgage. This is within the express Words of the Act; for it is an Interest in Land; and on Non-payment the Estate is absolute in Law; and his Interest is good in Equity to intitle him to receive and enjoy the Profits 'till Redemption or Satisfaction; and on a Foreclosure he has the absolute Estate both in Law and Equity.

2. That the Hardship is to Persons the Law intended a Hardship to.

3. That it is not so hard as to avoid any Purchase. For 'tis what was not contracted for, or rely'd upon.

3. 'Tis said the Act only extends to continuing Estates, &c.

Answ. 1. No such Distinction is in the Act, which says all Estates and Interests whatsoever. 2. This may necessitate Sales to provide for Children, &c. 3. 'Tis a continuing Interest. 'Tis true, the Sale, when it happens, may determine it, but that alters not the Nature of it in the mean Time: And how long e're that may be, God knows. It may continue unsold for ever, (and perhaps so intended).

4. 'Tis objected, That the Act only intends Real Estates, and that this is personal, &c.

Answ. 1. No such Distinction in the Act, nor any Words that countenance it; but econtra, all Terms are expressly within it, which are personal, and go to Executors. 2. In a Mortgage in Fee descended to the Heir, and unforeclosed, the Heir is a Trustee for two Persons, viz. 1st, For the Executor as to the Money, which is a particular Trust carved out of the whole Trust of the Fee, like a Term for Years out of an Inheritance; and, 2. For the Mortgagor as to the Rest of the Trust, who therefore has the Inheritance of the Trust. But tho' in that Case the Trust for the Executor is not an inheritable Trust, yet it is really a (continuing) Trust in that Land for the Mortgagor, tho' of another Nature; as he that has a Term for Years has as really an Interest in the Land, as he that has the Reversion, tho' of another Kind; and tho' the one be descendable and the other testamentary, it amounts but to this; 'Twill be Money after the Sale; and what now affects the Land, will by the Sale affect the Money.

So if a Man by Will gives Power to his Executors to sell Land and pay the Money to his Heir, 'till the Sale the Heir has a Fee therein; tho' when the Executors have executed their Power, it will be turned into Money.

So in Abbot and Barton's Case before cited, there was a Power to appoint any Estates, even the Fee, to other Persons; but yet 'till that was done, and the Use limited to the Party and her Heirs, it was the old Use descendable to the Heirs on the Part of the Mother.

But 2dly, All Rents and Profits of Lands, when receiv'd, will be Money or Goods, and yet the Right to them beforehand is within the Act, and is an Interest in the Land.

5. Obj. That the Words, Estates, Terms, Interests, &c. mean only Perception of the Profits, &c.

Answ. 1. Here is a Right to have an Account and Benefit of Rents and Profits till Sale; and the Sale only goes in

Defeasance of that Right. Now, how far off this Sale may be, I know not; and here is a direct Power over the Tenants in the mean Time.

2. What essential Difference is there between Rent and Money on Sale, as to the present Point? A Rent is the Price for which the Profits of the Land are sold for one Year, and a fore-hand Rent is properly a Taking up the Profits of Land by Anticipation; and on a Sale all the Profits of all future Years are sold, and the Party receives the Price, which is receiving the Profits by Anticipation; and no Distinction is between fore-hand Rent and after Rent; they are both the Profits of the Land: Profits taken yearly come in all in a Lump on a Sale; and the Right to the one or the other is a Right to the Profits out of the Land.

And therefore, where a Trust has been to raise Money out of the Rents and Profits of Lands; and the Rents are so small, that to raise it by Perception of them, would not answer the Purpose of the Trust; the Courts of Equity have with great Justice decreed a Sale, because that is still a Raising out of the Profits, tho' taken sooner by Anticipation.

6. Obj. That what a Man may do himself he may do by another, &c.

Answ. This Rule is right, provided no Law hinders; but here the Act of Parliament hinders; he may receive the Rents of his Estate twenty Years together, and pay 'em over to a Papist; but can he therefore make a Lease to another for twenty Years, on Trust to receive the Rents and pay 'em over to a Papist? The Difference is plain; in the one Case he creates a Trust for a Papist, and gives him a Right to demand the Profits of the Land; in the other Case the Papist receives only the Money from him, but never had any Demand out of the Land.

7. Obj. That this will answer the End of the Act, i. e. Turn Papists Estates into Money.

Answ. No. 1. This will defer and prevent doing it. It will deliver him from the Necessity of doing it; otherwise he must have done it himself, and then it had been over; but by this Way the doing it is delayed, and perhaps it will never be done.

2. This brings the Interest of unsold Lands to the Papist, and creates in him a new Interest to the Land, and a Power over the now Tenants.

3. This goes to sell them, not while they are in Popish Hands, but when they are descended to a Protestant Heir.

It is in effect a Disinheriting a Protestant Heir, that a Papist may have the Benefit; which surely was never the Intent of the Act.

4. This would be the same as if the Trust had been created by a Protestant: For if this be not an Interest within the Act, a Papist may purchase it from a Protestant, as well as have it given him by a Papist. Nor will it be material from whom the Estate comes.

8. Obj. But it may be further said, That all my Objections arise from the Non-performance of the Trust, which is not to be supposed; and that a Court of Equity ought rather to judge of it as if it were performed.

Answ. My Objections arise, 1. From the express Words of the Act; and, 2. From the manifest Inconvenience, if they are departed from.

And as to the supposing a Performance, observe:

1. There must necessarily be supposed a Time when 'twas unperformed, or there is no Room for a Performance; and at that Time a Papist had a Demand out of, and Interest in the Land.

2. I cannot suppose a Trust to be performed, which no Body has any Necessity, Interest or Inclination to perform.

3. The Trust is to pay out of the Profits. Paying out of the yearly Rents is no Performance in Effect. And a Sale is the only Way to perform it. But that is not done.

9. Obj. Well, but a Cure may perhaps be proposed for the Inconveniencies I have objected; as, That if there appears any Fraud, a Court of Equity will set that Right, or they may give another Construction in such Case.

Answ. We are not here upon a Law made to prevent any Act in it self fraudulent or injurious, and if so, yet the Evading of this would but occasion the Committing of the same Fraud another Way, and therefore to be met with in the first Instance.

Nor are we upon a Law which prohibits something under the Penalty of a Forfeiture to a third Person; tho' in that Case perhaps a Fraud to deprive such Person of a Title given him by such an Act, would be met with.

But this Act is a bare Disability; and if a Man be disabled to purchase one Sort of Estate or Interest, it is no Fraud to purchase another Sort of Interest which he is not disabled to purchase; nor to take Care, before he pays his Money,

Money, that the Seller has an Interest of such a Nature as he can purchase.

Besides, here he has no Stranger to deal with, but simply the Person he buys from, who being a Party to all that is done, and not surprised or drawn in, but honestly and fully paid, can never complain of Fraud.

Nor do I apprehend, That the greater or lesser Proportion of the Surplus can be material, if the Act extend not to an Interest of that Kind.

Nor can the Management of the Estate afterwards weigh any Thing; for this Act creates only a Disability, but makes no Forfeiture; it prevents a Vesting, but devests nothing vested; and if the Trust is admitted to be theirs, it is too late to dispute with them about the Management of what is their own.

2d Argument. I Am, it seems, in this Case, so unfortunate as to differ from some of my Brethren; they holding:

1. That this Case being on a Will, is not within the Act: And,
2. That if it were, yet this Method will not determine it.

This only opens a Way to a further Labour to consider, Whether a Gift by Will be within the Act, or not? Now consider;

1. By the first Expression in this Clause, Every Person being a Papist, or professing the Popish Religion, is disabled to purchase. And,

2. By the Second, All Estates made to any such Person are declared void. And here being in neither Expression any Reference to any one Manner of Conveyance, there seems no Room for a Distinction, Whether it be by Fine, or by Deed, or by Will, &c. But here is a general Incapacity of all Manner of Conveyances; and all Estates howsoever, or by whomsoever made, are declared void, if made to such Persons after such a Time.

This seems to me to be the clear Sense of the Words.

But the Objection consists of two Parts; if either of which fails, it falls to the Ground.

1. 'Tis said that the first Expression does not import any Disability to purchase in a proper or legal Sense, but only a

Diſability to purchaſe for a valuable Conſideration; which is ſaid to be the vulgar and common Senſe of the Word.

2. That thoſe Words which make Eſtates void, if made to ſuch Perſons, mean not ſuch Perſons as profeſs the Popiſh Religion (generally), but only ſuch purchaſing Papiſts.

And conſequently, That the Plaintiffs not having paid any valuable Conſideration; but this Truſt being given to them freely by a Will, this Caſe is not within the Act of Parliament.

I hold both theſe Propoſitions to be wrong; tho' if either be ſo the Concluſion will fall.

1. Firſt, A Purchaſor is a Law Term, and imports any Eſtate which is not caſt upon a Man by Act of Law (as Deſcent or Eſcheat). But which he takes or accepts by Conveyance for Money or other Conſideration, vel alia quavis Fortuna (ſays Sir H. Spelman) or freely of Gift (ſays my Lord Cook expreſly) Litt. fol. 12. 1 Inſt. 18. a. b. And thus it has been conſtantly uſed by all Lawyers for ſome Hundreds of Years without Interruption.

Not to multiply Particulars, let me inſtance in the Manner of Expreſſion of that known Rule which is in every Lawyer's Mouth, as mentioned by that very accurate Judge, Lord Hobart, in Counden and Clark's Caſe. Hob. 30.

This is a poſitive Rule, That a Man cannot raiſe a Fee-ſimple to his own right Heirs, as a Purchaſor, neither by Conveyance of Land, nor by Uſe, nor by Deviſe.

Mr. Attorney would ſeem to imagine a Difference between the Words To purchaſe, and To take by Purchaſe; but 'tis clear they are all one, and the Verb To purchaſe, is conſtantly uſed in the ſame Senſe as to take by Purchaſe; and in 1 Inſt. 2. a. b. 'tis uſed ſo near a dozen Times. And

The general Licences to Abbies after the Statute of Merton, are generally only Leave to purchaſe (ſo are Charters to Corporations); but no one ever doubted, but that thereby they might take what was given them, as well as what they ſhould buy and pay for.

And here all the Conjugates are uſed in the ſame Senſe as the Word Purchaſor, which is nomen verbale, and being formed from that verb, To purchaſe, it is naturally and properly to be uſed in that Senſe.

I will mention but one Inſtance where that Word is uſed in a Statute in the ſame Senſe (tho' in another Form of Expreſſion) on the Rule before cited out of Hobart. 'Tis in Pybus and Mitford's Caſe. 1 Vent. 372. Where Wild, Juſt. ſays,

says, I agree, A Man cannot either by Conveyance at Common Law, Limitation of Uses, or by Devise, make his right Heir a Purchasor.

Surely Laws are to be understood according to the Language of the Law, and a Law Term in an Act of Parliament is to be taken in its legal Sense.

Stat. 15 R. 2. c. 5. Takes Notice, That Mayors and Commonalty of Cities and Boroughs, and other Towns which have a perpetual Commonalty, be as perpetual as People of Religion; and therefore, First expresly extends the Statute De Religiosis to them in these Terms; from henceforth they shall not purchase to them and their Com', upon Pain contained in the said Stat. De Relig.

And it was never doubted, but that it would extend to what should be given to them, as well as to what they should buy.

I agree, That Purchasors for valuable Consideration have been distinguish'd from others in several Acts of Parliament, by Provisions made particularly for them, that they should not lose their Money; or by Exceptions to prevent their being involved in general Provisions against Fraud; but were never distinguished to their Loss or Prejudice, nor ever singled out to lose their Estates, because they had paid for them. Nor do those Acts of Parliament, which are in their Favour, speak of them as of Purchasors generally, but only as of one Species of Purchasors, i. e. Purchasors for valuable Consideration in express Terms; as,

Stat. 27 Eliz. c. 4. against fraudulent and covenous Conveyances, Sect. 1. Recites the Loss the Subject may have after Purchases made, &c. of Lands, &c. for Money and other good Considerations. Sect. 2. Makes fraudulent Conveyances void against Persons who shall purchase for valuable Considerations. Sect. 8. Makes Statutes not entred in due Time void against Persons who shall purchase for Money or good Consideration.

Stat. 21 Jac. 1. c. 19. of Bankrupts, Sect. 14. Provides, That no Purchasor for good and valuable Consideration shall be impeached by that Act, unless the Commission be sued out within five Years. And the Statute of Frauds and Perjuries, Sect. 15. is, That Judgments, as against Purchasors bona fide for valuable Considerations, of Lands to be charged thereby, shall in Judgment of Law be Judgments only from the Signing: And, Sect. 18. No Re-

cognizance shall bind any Land, &c. in Behalf of any Purchasor bona fide, and for valuable Consideration, but from the Time of the Inrolment.

I agree, if a Gentleman at the Bar were arguing on the Stat. 27 Eliz. against a fraudulent Conveyance, and should say, That his Client was a Purchasor, I should understand him to mean a Purchasor for a valuable Consideration, not because the Word Ex vi termini imports it; but because the Occasion of his Using it shews That to be his Meaning, or he talks nothing to the Purpose.

But the Case is different when we have under Consideration the proper Sense of the Words of an Act of Parliament; where no declared Meaning in any other Part of the Act determines the Intent, but we are to judge upon the enacting Part, what they have done, and only thence are to learn their Intent, and what they designed to do; for there of Necessity the Act must be understood always to speak properly, and in the Language of the Law.

But should I admit, That an Act of Parliament providing against Frauds and Artifices to defraud Purchasors, is to be confined only to Purchasors upon valuable Considerations, tho' not so expressed; for that Purchasors by free Gift can hardly be said to be defrauded in the Language of the Law; for if the Gift be defeated, they are but where they were, and so the subject Matter may supply the Distinction omitted in the Words:

Yet here is no Ground or Reason for the Distinction; It is all one as to the End and Intent of this Act, Whether the Lands were paid for, or not.

If the Law-makers look'd upon Lands in Papists Hands as the Support of Popery, and to stop the Growth thereof, and the Mischief the Owners might do the Publick, thought it reasonable to make Provisions against their further Acquisitions, Is it at all material whether those Acquisitions were paid for, or not? 100 l. per Annum acquired by a Papist by a voluntary Gift or Will, will be as prejudicial to the Publick, and as much against this Act, as where he has paid 2000 l. for it.

Nay, I take it, it will be more so; for then he has the Land and keeps his Money too, &c. and if he has gotten a new Sword, &c. it will do as much Execution when given him, as if he paid for it.

The

The Mischiefs intended to be remedied are the Rule whereby Acts of Parliament are to be expounded, and the Words are stretch'd, if there be occasion to reach them all. But it is very hard to reject the proper, natural and legal Sense of the Words in any Case, much more when it will so plainly let in an equal Mischief.

The first Statute of Mortmain speaks only of religious Persons. Now among all the Reasons or Expositions of those Laws, it was never pretended, that paying no Consideration excused them.

The Stat. 15 R. 2. (supra), speaking of Lay Communities, forbids only Purchasors generally; and yet 'twas plain the Law-makers look'd on 'em as equivalent. The Conveyance in Mortmain was the Thing in View, whether a Price were paid, or not, and what was the Motive was not material.

To give a much stronger Instance, the Stat. of Mag. Char. c. 32. (Nullus liber homo debet de cætero amplius, &c.) expresses both give and sell; but not expressly preventing the Mischief to the Lords, it was extended by Construction.

Also the Stat. 18 E. 1. Quia emptores enacts, That from thencefoyth it shall be lawful for every Freeman to sell, &c. Now here was fair Room for a Distinction, That this Statute sets the Freeholders free from Mag. Char. where they sell, but not where they give; because the Stat. only gives Liberty to sell, and Mag. Char. expressly forbids Giving as well as Selling; but the Act being a Provision for the Lord, and the Price being between the Parties only, and the Mischief of giving being the same as to him, it has been extended thereto.

And Litt. Sect. 40. speaking of this Act, says, That it was thereby ordained, That no Man should alien, or (give) grant Lands or Tenements in Fee-simple, to hold of himself: And that the Word Sale extends to Gifts. (Q.)

So here the Care is for the Publick, and to prevent Papists from getting new Acquisitions. What is paid, is only between the Grantor and Grantee, but does not concern the Publick at all. And therefore, &c. no Reason to form a Distinction here.

But we are not contending to enlarge the Sense of the Word (Purchase) but only to understand it in its true, genuine, proper, and legal Sense. And,

3. There is still less Room for this Distinction, because the subject Matter of this Clause is properly an Incapacity or Disability.

"Acts of Parliament are always expounded according to "the Rules and Reason of the Common Law; and when a "Provision is made by Act of Parliament, the Law endea- "vours to range it with some Provisions of its own of like "Nature."

The Stat. de Donis enacts, That Tenant in Tail non habeat Potest. alienandi Terram datam, so as to prevent its coming to his Issue; and that a Fine thereof sit in ipso Jure nullus. Now the End and Effect of this Stat. is a Disability to alien to the Prejudice of others; and therefore the Law now Ranks him with Bishops and other Ecclesiastical Persons, and with Husbands, who by the Common Law were disabled to alien to the Prejudice of their Successors and Wives.

And therefore tho' the Act be, That Tenant in Tail shall not have Power to alien, and that his Fine shall be void; yet it was construed, That his Fine was not void, but made a Discontinuance, and put the Issue to his Formedon; and that his other Alienations either put the Issue to his Action, or allow'd his Entry, just as the Law stood before in Relation to Bishops.

Now here by this Clause an Incapacity or Disability is brought upon a Papist. Then inquire. Has the Law any Species of Incapacity with which to rank this? Yes, For Capacity and Incapacity to purchase is a settled Notion therein, and therefore Papists are to be construed to be in the same Condition with those, who were under an Incapacity to purchase at Common Law. And whatever Distinction might be between one Purchasor and another in Respect of the Consideration and other Circumstances; there never yet was any between one Incapacity to purchase and another: And a Man under such Incapacity, was no more capable of Lands given him than of Lands bought; and if this Act be construed according to the Reason of the Common Law, a Papist is in the same Case.

And upon the Whole, I think that the Word Purchase here does by no Means make a valuable Consideration necessary.

But if there could any Doubt remain: Yet,

2. Secondly, The later Words leave no Room for any Distinction upon the Point of the Consideration; they are plain-

ly more general, and I apprehend more extensive than the former; and therefore if there were any Doubt upon the Word Purchase, i. e. Whether the larger or narrower Sense of the Word should be taken, it must now be in the larger Sense; because the Sense of those later Words in the Act, is at least as large as the largest Sense of the Word Purchase; and there can be no other Use of them, but to supply the Defect or Narrowness of the former Words.

Therefore, I shall not contend that it is an independant Clause: I content my self to have it admitted to be an explanatory or supplemental Clause, as the Words therein, such Person or Persons, must be explained to be Person or Persons professing the Popish Religion, i. e. Such Person or Persons as are spoken of before.

This is the natural Sense; but to construe such Person or Persons to be such purchasing Papists, is harsh, and I think not to be supposed either from the Grammar or the Context; for the Word Such refers to a precedent Description, and consequently to the Circumstances he is before described by; and not to make Words mentioned in his Punishment to be a necessary Part of his Description.

Suppose the first Disability had been a Disability to sue or bring an Action, and the Clause had run thus, That all and every Papist, or Person professing the Popish Religion, shall be disabled and made incapable to sue or bring an Action, and that Estates made to such Person or Persons should be void; would these last Words be expounded only of such Persons as should sue or bring Actions? No surely, The different Punishment inflicted can make no Difference in the Description of the Person.

I can't better illustrate this than by the common Method used in passing Bills in Parliament, i. e. To bring them in with Blanks for Times and Penalties. And so this Clause in the Bill would run, when first brought in, thus:

" And that from and after .... every Papist or Person " professing the Popish Religion, shall be disabled, and is " hereby made incapable, &c. .... And that all Estates, " Terms, Interests or Profits whatsoever out of Lands, " from and after .... to be made, suffered, or done, to " or for the Use, &c. of any such Person or Persons, or up- " on any Trust or Confidence, To or for the Benefit or Be- " half of any such Person or Persons, shall, &c.

As it stands here, the Words Such Person or Persons are plainly such as are described in the Beginning of the Clause, and are used to save the Repetition of that which is in the

foregoing Description. Is it possible now to think, that the Filling up of the Blanks can alter the Description of the Persons? And that one Sort of Persons will be meant if one Punishment be inserted, and another Sort if another; or,

That if the first Blank be filled up with a Disability to sue, That the last Clause only affects Estates granted to Plaintiffs; or if with a Disability to bear an Office, only Estates granted to Officers; or if with a Disability to be an Executor, only Estates granted to Executors?

No! the Description was full and compleat at the first; the same Persons are the Subjects of both Parts of the Clause; and whether the Blank be filled up with one Sort of Punishment, and the Second with another; or whether the Second be only an Inforcement of the First, it will be all one.

Besides! If you would refer it to Punishment, it should be such Papist as is disabled to purchase, and not such Papist purchasing, for there is no purchasing Papist spoken of. But,

The former Exposition operates not only upon purchasing Papists, but upon all: All are immediately ipso facto disabled, and the Act has its Effect upon those who are thereby deterred and restrained from Purchasing, as fully and as properly as upon those who shall attempt to purchase, and lose; and more agreeable to the Intent of the Act, which seems to aim at Prevention rather than Forfeiture. It seems then very strange, that the later Words should not extend to all Papists too.

In the Sense wherein I take them, the later Words are very useful and proper; they enlarge the former Words, if they are too short, or, by using Words not so capable of Distinction, remove the Ambiguity.

And the present Question shews it was very fit to put them in for that Purpose. But in any other Sense they are vain, and increase the Doubt instead of removing it.

And to look more narrowly, The Word Relief in the later Expression seems calculated for a Gift, as an Estate given or provided for Children, Relations, or any in Want, is properly said to be for their Relief: But an Estate in Land which a Man buys can never be said to be for his Relief; he has only altered the Nature of his Estate, and is not a Jot the Richer. Q.

Object.

Object. That Devises are not within this Clause: For that,

1. They are mentioned in the former Clause, and dropp'd in this; and,
2. If they be, this Clause clashes with the former, and makes an absolute Disability in the same Case where that makes only a qualified one.

Answ. Devises are not dropp'd in this second Clause. 'Tis true, they are not named therein, nor indeed could they be as that Clause is penned; but 'tis plain they are meant and implied in it.

Had the second Clause made all Fines, Feoffments, Grants, Releases, &c. to Papists void, and had omitted Devises; it might have been justly said, That Devises were dropp'd, or excluded, in it.

But here the general Words of this second Clause being relative to the former, 'tis plain Devises are included in those relative Words, Devises being expressly mentioned in the antecedent Clause, to which this subsequent does relate.

The Report of the Attorney and Solicitor General in the Case of *Vernon versus Benson.* *Ante* 47.

UPON Consideration of the several Matters laid before us, We humbly certify your Lordships, that altho' Grants or Warrants under the King's Sign manual, ought regularly to be countersigned by some Officer of State, according to the Nature and Import of such Grant or Warrant; and that the Omission of such Countersigning may be some Evidence of Surprise upon the Crown, when there is nothing to account for it: Yet we apprehend that Suspicion is removed in the present Case; the late Earl of Sunderland having by Letter referred the Consideration of this very Point to his Majesty's then Attorney General, and the Answer to that Letter by Sir Edward Northey, in which he seems to intimate that there was no Necessity, that a Warrant granted in Pursuance of the Proviso in the Statute 7 & 8 W. 3. abovementioned, should be countersigned: Which Intimation of his, together with a Doubt by what Officer it ought to be countersigned, might probably occasion that Omission. If the want of being countersigned makes the Instrument void; or if the Crown had no Authority to direct an Assignment of the Securities, because the 3300l. and Interest, was discharged by a Fall of Wood, and not paid in Money; We conceive the Petitioners may take Advantage of these Points in the ordinary Course of Justice.

As to what was insisted on for the Petitioners, with Regard to the Circumstances of their Case; and that his Majesty would not have directed an Assignment of the said Securities to the Person now claiming the Benefit thereof, if those Facts had been laid before his Majesty; but if they were not, we don't think our selves at Liberty to judge whether his Majesty would, or would not, have granted such Warrant in case they had been represented to him; since we are of Opinion he might, by Law, have granted it, notwithstanding any of these Matters insisted upon for the Petitioners.

Morgan *verſus* Dillon. *Ante* 135.

NOTA. The Decree in this Caſe was reverſed in the Houſe of Lords upon an Appeal, and the Lady Shean confirmed in the Guardianſhip.

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THIS Caſe was ſolemnly argued before the Lord Chancellor, aſſiſted by the two Chief Juſtices; and it appearing in the Cauſe, that the Defendant had kept the Complainant out of an Anſwer; and that the Proceſs's of Contempt were all run out againſt him before he anſwered; the Court and Judges were unanimous of Opinion, that the Depoſitions taken de bene eſſe on the Commiſſion formerly iſſued to examine Witneſſes, and which were taken before the Defendant had anſwered, ſhould be now read and given in Evidence, tho' the Defendant loſt the Benefit of Croſs-examining.



ERRATA.

PAGE 3. Line 26. read *Effect*: p. 4. l. 15. r. *Demiſed*. p. 7. l. 37. r. *would*. p. 23. l. 4. r. *Vanbrugh*. p. 52. l. 9. r. *act*. p. 60. l. 36. r. *thoſe*. p. 75. l. 21 and 35. r. *Codicil*. p. 96. l. 11. r. *did not*. p. 108. l. 7. r. *did not*. p. 102. l. 11. r. *Plaintiff*. p. 124. l. 30. for 2000, r. 500 Years, which ſtood unmerged by reaſon of the intermediate Term together. p. 125. l. 9. r. 500 Years. p. 148. l. 8. r. *after*. l. 26. r. *this*. p. 148. in the Marg. r. 2 *Sand*. 280. p. 149. l. 8. r. *conveyed*. l. 9. r. *hath*. l. 39. r. *Lords*; but p. 150. in Marg. r. 2 *Cr*. 260. 1 *Ven*. 345. p. 160. in Marg. 3 *Mod*. 209. p. 161. l. 9. r. 1719.

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